

No. 98-791-CFX

Title: J. Daniel Kimel, Jr., et al., Petitioners  
v.  
Florida Board of Regents, et al.

Docketed:  
November 16, 1998

Court: United States Court of Appeals for  
the Eleventh Circuit

Vide:  
98-796

Entry Date

Proceedings and Orders

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Nov 13 1998	Petition for writ of certiorari filed. (Response due December 16, 1998)
Dec 11 1998	Brief of respondent Univ. of Montevallo in opposition filed. VIDE.
Dec 11 1998	Waiver of right of respondent Florida Board of Regents, et al. to respond filed. VIDE.
Dec 30 1998	Reply brief of petitioners J. Daniel Kimel, et al. filed.
Jan 6 1999	DISTRIBUTED. January 22, 1999
Jan 25 1999	Petition GRANTED. The case is consolidated with No. 98-796, United States v. Florida Board of Regents, and a total of one hour is allotted for oral argument. SET FOR ARGUMENT October 13, 1999.
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Feb 25 1999	The time to file brief of the Solicitor General and brief of petitioners in No. 98-791, is extended to and including 21 days from the date of decisions by the Court in College Savings Bank v. Florida Prepaid, No. 98-149, and Florida Prepaid v. College Savings Bank, No. 98-531, or July 16, 1999, whichever occurs first.
Jul 12 1999	Brief amicus curiae of English Language Advocates filed. VIDE.
Jul 14 1999	Brief amici curiae of AARP, et al. filed.
Jul 14 1999	Joint appendix filed. VIDE.
Jul 14 1999	Brief of petitioner United States filed. VIDE.
Jul 16 1999	Brief of petitioners J. Daniel Kimel, et al. filed. VIDE.
Jul 22 1999	Order extending time to file respondent's brief on the merits to and including August 17, 1999.
Aug 13 1999	Brief amicus curiae of Coalition for Local Sovereignty filed.
Aug 17 1999	Brief of respondents Florida Board of Regents, et al. filed. VIDE.
Aug 17 1999	Brief amici curiae of Ohio, et al. filed. VIDE.
Aug 17 1999	Brief amicus curiae of Pennsylvania House of Representatives, Republican Caucus filed.
Aug 25 1999	Record filed.
Aug 25 1999	Motion of Solicitor General for divided argument filed.
Aug 26 1999	CIRCULATED.
Aug 30 1999	Record filed.
Sep 15 1999	Reply brief of petitioner United States filed. VIDE.
Sep 16 1999	Reply brief of petitioners J. Daniel Kimel, et al. filed.
Sep 27 1999	Record filed.
Sep 28 1999	Motion of Solicitor General for divided argument GRANTED.

Entry     Date

Proceedings and Orders

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Sep 28 1999

LODGING consisting of ten copies each of the following documents, Univ. of Montevallo Faculty Grievance Policy and Procedures and a chart of appendix material submitted by counsel for the respondents, received and distributed. VIDED.

Oct 13 1999

ARGUED.



No. **98 791** NOV 13 1998

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1998

J. DANIEL KIMEL, JR., *et al.*,  
*Petitioners,*  
v.

STATE OF FLORIDA BOARD OF REGENTS, *et al.*,  
*Respondents.*

On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Eleventh Circuit

**PETITION FOR A WRIT OF CERTIORARI**

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**QUESTION PRESENTED**

Whether the Eleventh Amendment bars a private suit in federal court against a State for violation of the Age Discrimination in Employment Act.

## PARTIES

This Petition for Certiorari is filed on behalf of the following Petitioners, who were the plaintiffs in three separate cases which were consolidated for argument and decision by the Court of Appeals:

Burton H. Altman, Robert W. Beard, Vandall K. Brock, John D. Calman, Elaine D. Cancalon, Siwo De Kloet, Joseph F. Donoghue, Ralph C. Dougherty, Phillip E. Downs, Richard M. Dunham, Robert L. Fulton, Alice C. Gaar, Richard E. Glick, Bruce T. Grindal, William H. Heard, Richard L. Iverson, Herman G. James, Jr., J. Daniel Kimel, Jr., Philip Lazarus, William E. Leparulo, Winston W. Lo, Deborah B. Maher, Richard N. Mariscal, Ronald W. Martin, Charles G. MacDonald, Robert R. Mead-Donaldson, Connie G. Morris, Sharon E. Nicholson, Lucia Patrick, Joseph J. Pettigrew, Jr., John R. Quine, Katherine M. Shelfer, Jerome H. Stern, Richard P. Sugg, Charles W. Swain, and Edward D. Wynot, Jr., plaintiffs-appellees in *Kimel v. Florida Board of Regents*, No. 96-2788 (11th Cir.).

Wellington N. Dickson, plaintiff-appellee in *Dickson v. Florida Department of Corrections*, No. 96-3773 (11th Cir.).

Roderick MacPherson and Marvin Narv, plaintiffs-appellants in *MacPherson v. University of Montevallo*, No. 96-6947 (11th Cir.).

Respondents are the Board of Regents of the State of Florida, defendant-appellant in *Kimel v. Florida Board of Regents*; Florida Department of Corrections, Jackson County, defendant-appellant in *Dickson v. Florida Department of Corrections*; the University of Montevallo, defendant-appellee in *MacPherson v. University of Montevallo*, and the United States, which intervened and filed briefs on the side of the plaintiffs in all three cases while the appeals were pending.

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 J. DANIEL KIMEL, JR., et al.,  
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STATE OF FLORIDA BOARD OF REGENTS, et al.,  
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 On Petition for a Writ of Certiorari to the  
 United States Court of Appeals  
 for the Eleventh Circuit

\_\_\_\_\_  
**PETITION FOR A WRIT OF CERTIORARI**  
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Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in *Kimel v. State of Florida Board of Regents*, *Dickson v. Florida Department of Corrections*, and *MacPherson v. University of Montevallo*, three cases consolidated by the Court of Appeals for decision in a single opinion, published at 139 F.3d 1426 (11th Cir. 1998).



### OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 139 F.3d 1426, and is reprinted in the Appendix to this Petition ("App.") at 1a. The opinion of the United States District Court for the Northern District of Florida in *Kimel v. State of Florida Board of Regents* is unreported and is reprinted at App. 51a. The opinion of the United States District Court for the Northern District of Florida in *Dickson v. Florida Department of Corrections* is unreported and is reprinted at App. 57a. The opinion of the United States District Court for the Northern District of Alabama in *MacPherson v. University of Montevallo* is reported at 938 F. Supp. 785, and is reprinted at App. 61a.

### JURISDICTION

The panel opinion of the Court of Appeals was issued on April 30, 1998. Timely petitions for rehearing and suggestions for rehearing *en banc* were denied on August 17, 1998. App. 70a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides as follows: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State."

The Age Discrimination in Employment Act is codified at 29 U.S.C. §§ 621-634, and is reprinted at App. 73a-107a.

### STATEMENT OF THE CASE

Petitioners are plaintiffs in three otherwise unrelated federal lawsuits, each of which alleges, *inter alia*, that the plaintiffs' State employers discriminated against them on the basis of age, in violation of the Age Discrimination in Employment Act ("ADEA" or "the Act"), 29 U.S.C. § 623. Although the ADEA provides for private suits against States for violations of the Act, *see* 29 U.S.C. §§ 626(c), 630(b), the State defendant in each lawsuit moved to dismiss on the ground that States are immune from such suits in federal court under the Eleventh Amendment to the United States Constitution. These motions were denied in the two cases filed in the United States District Court for the Northern District of Florida—*Kimel v. State of Florida Board of Regents* and *Dickson v. Florida Department of Corrections*—and the State defendant in each case filed an immediate appeal to the Eleventh Circuit. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993). The state defendant's motion to dismiss was granted in the case filed in the United States District Court for the Northern District of Alabama—*MacPherson v. University of Montevallo*—and the plaintiffs in that case appealed to the Eleventh Circuit. The Court of Appeals consolidated the three cases for argument and decision.

In a 2-1 decision that produced no majority opinion—but rather three separate opinions, reflecting the division that exists among Courts of Appeals over the issue—the Eleventh Circuit concluded that the States are immune from ADEA suits by private parties in federal court.

Explicitly rejecting the conclusions of other Circuits that had found in the ADEA an unequivocal expression of intent to abrogate State immunity, *see* App. 11a n.14, Judge Edmondson concluded that "although . . . these courts are drawing a permissible inference from the statute, I cannot agree that the ADEA's language includes an unequivocal declaration of abrogation of States' im-

munity as required by the Constitution and the Supreme Court.” *Id.* On that basis, Judge Edmondson concluded that States cannot be sued by private parties in federal court under the ADEA.

In a separate opinion, Judge Cox reached the same result on a different ground, concluding that “[w]hether or not Congress clearly expressed its intent, it lacks the power to abrogate the state’s immunity . . . under the ADEA,” App. 40a, because the ADEA exceeds Congress’s power to enforce the Fourteenth Amendment. In reaching this conclusion, Judge Cox acknowledged that his holding directly conflicted with the holdings of other Circuits. App. 43a n.1.

Chief Judge Hatchett, writing in dissent, rejected the conclusions and underlying analyses of both of his colleagues. In contrast to Judge Edmondson, Judge Hatchett would have followed the conclusion of “virtually every other court that has addressed the question . . . that Congress made an ‘unmistakably clear’ statement of its intent to abrogate the states’ sovereign immunity in the ADEA.” App. 16a (citing cases). Rejecting as well Judge Cox’s view, Judge Hatchett stated that, “like many other circuit courts, I conclude that the ADEA falls within the enforcement power that Section 5 of the Fourteenth Amendment confers on Congress.” App. 21a (citing cases).

#### REASONS FOR GRANTING THE WRIT

This Court’s decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), has resolved a set of important Eleventh Amendment questions and in so doing has precipitated a set of follow on questions—of great import—as to Congress’s authority to provide for private party federal causes of action as a means of enforcing the federal statutory obligations placed on the States. The latter have proved difficult and divisive in the lower courts. Thus, just this week this Court granted certiorari to review

one of the questions that follows on from *Seminole Tribe*: whether private federal causes of action created by Congress against the States must be heard in state courts, even when the federal courts are closed to such actions. See *Alden v. Maine*, No. 98-436 (U.S.).

The question raised by the instant case—whether federal courts may entertain private suits to enforce compliance by States with the Age Discrimination in Employment Act—follows from *Seminole Tribe* just as inevitably as the issue in *Alden*, and has engendered even more litigation and a sharper split in the lower court authority. Thus the same considerations that counseled for the grant of the *Alden* petition counsel for the grant of this petition. Indeed, given their joint relation to *Seminole Tribe*, grant of the petition here would enable the Court to consider different ramifications of that ruling at the same time and to gain the benefit of the cross lights these questions throw on each other.

1. In *Seminole Tribe*, this Court clarified the scope of Congress’s power under the Eleventh Amendment to abrogate the States’ immunity from suit in federal court, holding that Congress may do so only if Congress (1) unequivocally expresses its intent, 517 U.S. at 55, and (2) acts “pursuant to a constitutional provision granting Congress the power to abrogate,” *id.* at 59. In the second regard, *Seminole Tribe* settled what had been a vigorous debate over the constitutional source of Congress’s authority to abrogate the States’ immunity, by overruling precedent finding such congressional power in Article I, *see id.* at 66 (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)), and by leaving undisturbed the precedents finding such power in the Fourteenth Amendment, *see id.* at 59-60, 66 (discussing *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)).

This Court’s subsequent decision in *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), placed an additional



gloss on the second prong of the *Seminole Tribe* abrogation inquiry. Rejecting dicta in earlier decisions suggesting a more expansive authority, the Court in *Boerne* held that Congress's power to enforce the Fourteenth Amendment is confined to the enactment of laws that seek to "deter[] or remed[y]" violations of the Amendment. See *id.* at 2163. The Court emphasized that, where Congress deems it necessary in pursuit of remedial or preventive ends "to prohibit conduct which is not itself unconstitutional," *id.*, Congress's authority is sufficiently "broad" to sustain such a prohibition, *id.*; but the Court also explained that any such prohibition must show "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 2164.

Thus the question presented in this case requires two determinations under *Seminole Tribe*. First, does the ADEA clearly express Congress's intent to abrogate State immunity? Second, was it within Congress's powers under the Fourteenth Amendment—as delineated in *Boerne*—to require the States to abide by the particular prohibitions on age discrimination set forth in the ADEA? The Circuits have divided as to the fundamental question presented here, and the division is reflected in both of the subsidiary inquiries.

Seven Circuits have concluded that Congress *did* permissibly abrogate State immunity from ADEA suits. See *Migneault v. Peck*, No. 97-2099 [1998 WL 741545] (10th Cir. Oct. 23, 1998); *Coger v. Board of Regents of the State of Tennessee*, 154 F.3d 296 (6th Cir. 1998); *Scott v. University of Mississippi*, 148 F.3d 493 (5th Cir. 1998); *Keeton v. University of Nevada Sys.*, 150 F.3d 1055 (9th Cir. 1998); *Goshtasby v. Board of Trustees*, 141 F.3d 761 (7th Cir. 1998); *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694 (1st Cir. 1983); *Arritt v. Grisell*, 567 F.2d 1267 (4th Cir. 1977). The decision below and, even more recently, the Eighth Circuit's decision in *Humenansky v. Regents of the University of Minnesota*,

152 F.3d 822 (8th Cir. 1998), *reh'ng. en banc denied*, Nov. 3, 1998 (3 judges dissenting), have held to the contrary.

As we will show, the minority position adopted by the Eleventh Circuit in this case and by the Eighth Circuit in *Humenansky* is incompatible with the relevant decisions of this Court. And, more fundamentally for present purposes, until the conflict between those two Circuits and the seven other Circuits that have decided the question presented here is resolved by this Court, the right of private plaintiffs to enforce the ADEA against State defendants in federal court will vary from Circuit to Circuit. Certiorari should be granted to resolve the conflict and to restore uniformity to the enforcement of this important federal statute.

2. As noted, Judge Edmondson found in favor of State immunity on the ground that the ADEA does not sufficiently evince Congress's intent to abrogate that immunity. His opinion reasoned that the ADEA does not contain a "reference to the Eleventh Amendment or to States' sovereign immunity," App. 7a, or "in one place, a plain, declaratory statement that States can be sued by individuals in federal court," *id.*

One Circuit has agreed, in a divided opinion, with Judge Edmondson's conclusion that the ADEA does not contain a sufficiently clear indication of congressional intent to abrogate State immunity. Compare *Humenansky*, 152 F.3d at 824-25 (majority opinion), with *id.* at 829 (Bataillon, D.J., dissenting).

Six other Circuits have squarely held the opposite. See *Migneault*, 1998 WL 741545 at \*3 (reaffirming *Hurd v. Pittsburg State Univ.*, 109 F.3d 1540, 1543-44 (10th Cir. 1997)); *Coger*, 154 F.3d at 301-02; *Keeton*, 150 F.3d at 1057; *Scott*, 148 F.3d at 499-500; *Goshtasby*, 141 F.2d at 765-66; *Ramirez*, 715 F.2d at 700-01. In addition such a holding is implicit in the Fourth Circuit's

decision in *Arritt*, 567 F.2d at 1270-71; and the Third Circuit has stated the same view in dictum, see *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 695 (3d Cir. 1997).

As those courts explain, in 1974 Congress amended the ADEA's definition of "employer" to include "a State or political subdivision of a State." See 29 U.S.C. §630(b). Section 7(c) of the ADEA already provided that any person aggrieved by an employer's violation of the ADEA "may bring a civil action in *any court of competent jurisdiction* for . . . legal and equitable relief," 29 U.S.C. § 626(c) (emphasis added); and when Congress extended the ADEA to the States in 1974, it also incorporated into the ADEA's enforcement mechanism, see 29 U.S.C. § 626(b), a provision in the Fair Labor Standards Act authorizing private suits against "employers (including a public agency) in any *Federal* or State court of competent jurisdiction." 29 U.S.C. § 216(b) (emphasis added).

Thus, the § 216(b) enforcement provision incorporated by § 626(b) "specifically authorize[s] ADEA suits in federal court," *Hurd*, 109 F.3d at 1544 n.3; and "the language of § 626(b) and § 216(b) in conjunction with the specific extension of the ADEA to state employers unequivocally expresses Congress's intent that state employers may be sued under the ADEA in federal courts." *Scott*, 148 F.3d at 500. "Unless Congress had said in so many words that it was abrogating the states' sovereign immunity—and that degree of explicitness is not required . . . —it could not have made its desire to override the states' sovereign immunity much clearer." *Goshtasby*, 141 F.2d at 766 (quoting *Davidson v. Board of Governors*, 920 F.2d 441, 443 (7th Cir. 1990)).<sup>1</sup>

<sup>1</sup> See also *Coger*, 154 F.3d at 301 (holding that "Congress made its intent to abrogate unmistakably clear" because "Congress's decision to make states liable under the ADEA is an unmistakable statement that states are not immune from ADEA suits"); *Keeton*, 150 F.3d at 1057 ("We join the overwhelming majority of our

In view of the unmistakable indications that Congress intended to abrogate the States' immunity from ADEA suits, Judge Edmondson's insistence on an explicit reference by Congress to the Eleventh Amendment, or on a simple statement "in one place" of Congress's intent to abrogate the immunity, cannot be squared with this Court's decisions. See *Dellmuth v. Muth*, 491 U.S. 223, 233 (1989) (Scalia, J., concurring) (explaining that Congress sufficiently evinces its intent to abrogate when the statute "clearly subjects States to suit for monetary damages, though without explicit reference to state sovereign immunity or the Eleventh Amendment"); *Seminole Tribe*, 517 U.S. at 56-57 (finding an "'unmistakably clear' statement" of intent to abrogate by reading "various provisions" of a statute together, and focusing on the "context" in which the provisions appeared).

Thus, not only is there a square conflict on the issue of intent to abrogate, but the minority view on that issue, adopted by Judge Edmondson in this case and by the Eighth Circuit in *Humenansky*, is clearly incorrect.

3. Judge Cox, on the other hand, adopted the position that the ADEA failed the *Seminole Tribe* abrogation test because the Act exceeds Congress's power to enforce the Fourteenth Amendment. Judge Cox reasoned that "[t]he elderly are not a suspect class, and state action that disadvantages them is constitutional if it passes [the] rational basis test." App. 44a. Because some acts of discrimination prohibited by the ADEA would not necessarily violate the Fourteenth Amendment, Judge Cox concluded that "[t]he ADEA does not qualify under *Boerne's* rule as a proper exercise of Congress's § 5 power." App. 43a.

sister circuits in holding that Congress clearly expressed its intention to abrogate states' immunity in private suits for violations of the ADEA. . . . With the specific inclusion of State government in the 1974 amendments, Congressional intent could hardly have been clearer.").



On that point as well, only the Eighth Circuit agrees that the ADEA does not permissibly abrogate State immunity. See *Humenansky*, 152 F.2d at 826-28.

At the same time, seven other Circuits have held that the ADEA is within Congress's power to enforce the Equal Protection Clause,<sup>2</sup> and five of the Circuits have affirmed that proposition since *Boerne* was decided.<sup>3</sup>

Courts that have reached this conclusion in light of *Boerne* have recognized that this Court's "equal protection jurisprudence is not confined to suspect or quasi-suspect classifications." *Coger*, 154 F.3d at 305. Accord *Migneault*, 1998 WL 741545 at \*5; *Keeton*, 150 F.3d at 1058; *Scott*, 148 F.3d at 501; *Goshtasby*, 141 F.3d at 771. Rather, "the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination." *Coger*, 154 F.3d at 305 (quoting *Sunday Lake Iron Co. v. Wakefield Township*, 247 U.S. 350, 352 (1918)). It follows that the "fact that age is not a suspect classification does not foreclose Congress from enforcing the Equal Protection Clause through an enactment protecting against arbitrary and invidious age discrimination." *Goshtasby*, 141 F.3d at 770.

In the view of the majority of the Circuits, that is exactly what the ADEA accomplishes: "[I]t is clear that the purpose of the [extension of the ADEA to the States] was to prohibit arbitrary, discriminatory government conduct that is the very essence of the guarantee of 'equal protection of the laws' of the Fourteenth Amendment." *EEOC v. Elrod*, 674 F.2d 601, 604 (7th Cir. 1982) (quoted in *Goshtasby*, 141 F.3d at 767). See *Coger*,

<sup>2</sup> See *Migneault*, 1998 WL 741545 at \*4-7 (reaffirming *Hurd*, 109 F.3d at 1544-46); *Coger*, 154 F.3d at 305-07; *Scott*, 148 F.3d at 500-03; *Keeton*, 150 F.3d at 1057-58; *Goshtasby*, 141 F.3d at 766-72; *Ramirez*, 715 F.2d at 698-700; *Arritt*, 567 F.2d 1270-71.

<sup>3</sup> See *Migneault*; *Coger*; *Scott*; *Keeton*; *Goshtasby*.

154 F.3d at 307 ("Congress concluded that the practice of using age classifications in employment . . . violated the Constitution because such classifications are arbitrary and discriminatory."); *Keeton*, 150 F.3d at 1058 ("[The ADEA's] protections . . . were aimed at ending the arbitrary, discriminatory conduct that the Equal Protection Clause targets."); accord *Migneault*, 1998 WL 741545 at \*5-6; *Scott*, 148 F.3d at 502-03; *Ramirez*, 715 F.2d at 699; *Arritt*, 567 F.2d at 1270 n.11.

The Circuits that have adopted the majority view since *Boerne* also have explained why the ADEA satisfies this Court's requirement that, for an enactment to lie within Congress's authority to enforce the Equal Protection Clause, there must be "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Boerne*, 117 S. Ct. at 2163. The ADEA "requires personalized determinations based on facts. If . . . youth is a bona fide occupational qualification that is reasonably necessary to the normal operation of the particular business, an employer may use age as a criterion for employment decisions." *Scott*, 148 F.3d at 503 (quoting *Goshtasby*, 141 F.3d at 772). Thus, "unlike the statute at issue in [*Boerne*], which imposed 'the most demanding test known to constitutional law,' the ADEA is narrowly drawn to protect older citizens from arbitrary and capricious action by the state." *Goshtasby*, 141 F.3d at 772 (quoting *Boerne*, 117 S. Ct. at 2171). See also *Migneault*, 1998 WL 741545 at \*6 ("Rather than having [as] sweeping coverage as the Religious Freedom Restoration Act, the ADEA is narrowly confined to combat the problem at issue, arbitrary age discrimination.").<sup>4</sup>

<sup>4</sup> See also App. 29a n.12 (Hatchett, C.J., dissenting) (explaining that, because of statutory proof requirements and affirmative defenses, "the ADEA only targets arbitrary age discrimination, rather than every employment decision that is based on or related to age").

In sum, in direct conflict with the position adopted by Judge Cox in this case and by the Eighth Circuit in *Humenansky*, the decisions of the other Circuits that have examined—through the lens of *Boerne*—the ADEA's satisfaction of the second prong of the *Seminole Tribe* inquiry have reached the following conclusion, well-stated by the Sixth Circuit:

Although the ADEA may prohibit some conduct not prohibited by the Constitution, "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress's enforcement power even if in the process it prohibits some conduct which is itself not unconstitutional." *City of Boerne*, 117 S. Ct. at 2163. The *City of Boerne* Court explained that "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies." *Id.* at 2164. Thus, even after the *City of Boerne*, the fact that some ADEA provisions may exceed constitutional requirements does not render the statute so disproportionate to its purpose that it represents an invalid exercise of Congress's enforcement power.

*Coger*, 154 F.3d at 307.

\* \* \* \*

The decision of the Eleventh Circuit in this case applies this Court's Eleventh Amendment jurisprudence in a manner that imposes severe—and we believe unwarranted—limitations on the authority of Congress to place enforceable legal obligations on the States. As in *Alden v. Maine*, this holding is of great consequence, and raises a question growing out of *Seminole Tribe* that has sharply divided the lower court authority. The decision below makes one of the most important federal anti-discrimination laws unenforceable by private action against the States in federal courts in the Eleventh Circuit. The Eighth Circuit subsequently has adopted the

same position, while seven other Circuits, properly applying this Court's precedents, have squarely held that such actions may be maintained. Certiorari should be granted to resolve this conflict and to establish uniformity in the enforcement of the ADEA.

### CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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## **APPENDICES**

1a

APPENDIX A

UNITED STATES COURT OF APPEALS  
ELEVENTH CIRCUIT

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Nos. 96-2788, 96-3773 and 96-6947

J. DANIEL KIMEL, JR., RALPH C. DOUGHERTY, BURTON  
H. ALTMAN, ROBERT W. BEARD, VALDALL K. BROCK,  
*et al.*,

*Plaintiffs-Appellees,*

DORIS C. BAKER, *et al.*,

*Plaintiffs,*

v.

STATE OF FLORIDA BOARD OF REGENTS,  
*Defendant-Appellant.*

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WELLINGTON N. DICKSON, a.k.a. DUKE,  
*Plaintiff-Appellee,*

v.

FLORIDA DEPARTMENT OF CORRECTIONS,  
JACKSON COUNTY,  
*Defendant-Appellant,*

JACKSON CORRECTIONAL INSTITUTE, JIM FOLSOM, and  
JAMES EDWARD CHILDS, a.k.a. J.E. CHILDS, MAJOR,  
*Defendants.*

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2a

RODERICK MACPHERSON, MARVIN NARZ,  
*Plaintiffs-Appellants,*

v.

UNIVERSITY OF MONTEVALLO,  
*Defendant-Appellee,*

NATIONAL EMPLOYMENT LAWYERS ASSOCIATION,  
*Amicus,*

UNITED STATES OF AMERICA,  
*Intervenor-Appellant.*

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Appeals from the United States District Court  
for the Northern District of Florida

Appeal from the United States District Court  
for the Northern District of Alabama

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April 30, 1998

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Before HATCHETT, Chief Judge, and EDMONDSON  
and COX, Circuit Judges.

EDMONDSON, Circuit Judge: <sup>1</sup>

Three cases presenting the same or similar issues of Eleventh Amendment immunity were consolidated and are addressed in this appeal. In all three cases, the States, or their agencies, submitted motions to dismiss based on Eleventh Amendment immunity. The issues in this appeal are whether Congress abrogated States' Eleventh Amend-

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<sup>1</sup> Judge Edmondson announces the judgment for the Court in this case. Judge Cox concurs in the result in Part I of Judge Edmondson's opinion but decides the issue on a different basis. Chief Judge Hatchett dissents in Part I. Chief Judge Hatchett concurs in the result in Part II of Judge Edmondson's opinion but also writes separately on the issue. Judge Cox dissents in Part II of the opinion.

3a

ment immunity for suits under the Age Discrimination in Employment Act ("ADEA") and under the Americans with Disabilities Act ("ADA").<sup>2</sup>

Two district courts, the Northern District of Florida, Tallahassee Division, in *State of Florida, Board of Regents v. Kimel* ("Kimel") and the Northern District of Florida, Panama City Division, in *Florida Department of Corrections v. Dickson* ("Dickson"), held that Congress effectively abrogated States' sovereign immunity with its enactment of the ADEA (and for *Dickson* the ADA) and denied the motions to dismiss. But, the Northern District of Alabama in *MacPherson, Narz v. University of Montevallo* ("MacPherson") granted the State's motion to dismiss on Eleventh Amendment grounds. We agree with the Northern District of Alabama that suits by private parties against States in federal court for ADEA violations are prohibited by the Eleventh Amendment.

The cases were appealed for us to decide whether Congress abrogated sovereign immunity when it enacted the relevant statutes.<sup>3</sup> Because this appeal presents only questions of law, not dependent upon factual determinations, the facts of each Plaintiff's claim will not be discussed.

#### *Discussion*

A district court's order denying or granting a motion to dismiss a complaint against a State based on the Eleventh Amendment's grant of sovereign immunity is reviewed

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<sup>2</sup> Only case number 96-3773, *Florida Dep't of Corrections v. Dickson*, presents the Eleventh Amendment issue for the ADA.

<sup>3</sup> Plaintiff Wellington Dickson claims we lacked jurisdiction to hear the State of Florida's appeal of the denial of its motion to dismiss. This appeal is properly before this Court under the collateral order doctrine. Like qualified immunity, a decision on this issue after trial would defeat the State's right to be immune from trial. The Eleventh Amendment provides the States with immunity from suit, not just immunity from damages. See *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144, 113 S.Ct. 684, 688, 121 L.Ed.2d 605 (1993).

by this court *de novo*. See *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016, 1021 (11th Cir.1994), *aff'd*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996).

The Eleventh Amendment states:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. This provision not only prohibits suits against States in federal court by citizens of other States, but also prohibits suits brought against a State in federal court by its own citizens. *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890).<sup>4</sup>

In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), the Supreme Court recently considered the issue of when Congress can properly abrogate States' Eleventh Amendment immunity. The Court's decision in *Seminole* overruled *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989), which held that acts taken by Congress pursuant to the Commerce Clause could, if sufficiently clear, abrogate Eleventh Amendment immunity. In *Seminole*, the Court specifically held that Congress had no authority to abrogate State sovereign immunity under the Eleventh Amendment when Congress acted pursuant to the Commerce Clause; the power to abrogate only exists under Section 5 of the Fourteenth Amendment.<sup>5</sup>

<sup>4</sup> The Eleventh Amendment only prohibits suits by private parties against unconsenting States in federal court. See *Maine v. Thiboutot*, 448 U.S. 1, 9 n. 7, 100 S.Ct. 2502, 2507 n. 7, 65 L.Ed.2d 555 (1980) (Eleventh Amendment principles are not applicable to suits in state court.).

<sup>5</sup> The enforcement provision of the Fourteenth Amendment provides:

In addition, the Court set out precisely what Congress must do to abrogate the States' immunity.

Two requirements must be satisfied before Eleventh Amendment immunity can be successfully abrogated by Congress. *Seminole*, 517 U.S. at 54, 116 S.Ct. at 1123. First, Congress must have intended to abrogate that immunity by providing "a clear legislative statement" of its intent—"making its intention unmistakably clear in the language of the statute."<sup>6</sup> *Id.* (citing *Blatchford v. Native Village of Noatak and Circle Village*, 111 S.Ct. 2578, 2584 [1991], and *Dellmuth v. Muth*, 491 U.S. 223, 224-25, 109 S.Ct. 2397, 2399-2400 [1989]). Second, Congress must have attempted to abrogate this immunity under proper constitutional authority. In other words, Congress must have enacted the statute at issue using its Fourteenth Amendment, Section 5, enforcement powers. See *Seminole*, 517 U.S. at 62-63, 116 S.Ct. at 1127-28.<sup>7</sup>

### I. Age Discrimination in Employment Act of 1967

Although I believe good reason exists to doubt that the ADEA was (or could have been properly) enacted pursuant to the Fourteenth Amendment, I will not decide that question today;<sup>8</sup> questions of constitutional power

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const. amend. XIV, § 5.

<sup>6</sup> For me, "unmistakably" strongly intensifies the implications of "clear;" and I take that message to heart.

<sup>7</sup> The Eleventh Amendment can also be abrogated by a State's waiver—actual consent—but no one claims that a waiver occurred in these cases.

<sup>8</sup> This doubt is suggested by a variety of considerations, to state briefly a few: (1) where the Supreme Court has held that Congress enacted a statute pursuant to its Commerce Clause powers, we must be cautious about deciding that Congress could have acted pursuant to a different power. See *League of United Latin Amer. Citizens, Council No. 4434 v. Clements*, 986 F.2d 728, 758-59 (5th Cir.1993)



should be decided only as a last resort. Instead, I focus on the ADEA's words and rest my decision on the lack of unmistakably clear legislative intent.

In searching the ADEA for an unequivocal statement of intent to abrogate, courts look only to the language of the statute itself. *Dellmuth*, 491 U.S. at 228, 109 S.Ct. at 2401 (“[E]vidence of congressional intent must be both *unequivocal and textual* . . . [l]egislative history will be irrelevant” because if the intent is clear in the language of the statute, “recourse to legislative history will be unnecessary.”) (emphasis added). A court’s guess about Congress’s political will and subjective intentions—past, present, or future—is without consequence; only the statute and its language are to be considered. As directed by the Supreme Court, I do not go beyond the text of the ADEA in deciding whether it contains the requisite, unmistakably clear statement of intent to abrogate. *Id.*

This requirement—that the intent to abrogate be found in an unmistakably clear statement in the language of

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(“Although there was some argument that Congress acted pursuant to its enforcement powers under the Fourteenth Amendment in passing the ADEA, the [Supreme] Court in *Gregory v. Ashcroft* ultimately concluded that Congress had acted *only* pursuant to its Commerce Clause powers.”) (emphasis added); (2) where two statutes are enacted together in the same bill, like the ADEA and the Fair Labor Standards Act (“FLSA”), it seems reasonable that Congress enacted the bill—all portions of it—pursuant to the same authority. See 120 Cong. Rec. 7337 (1974) (FLSA enacted *only* pursuant to Congress’s Commerce Clause power, especially considering that the FLSA [like the ADEA] initially only applied to private employers, who are not the proper subjects of Fourteenth Amendment enforcement); (3) when addressing a characteristic, such as age, that is not the kind of immutable characteristic as race, gender, or national origin, it is questionable that Congress could lawfully be acting to enforce the Fourteenth Amendment. See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 310, 96 S.Ct. 2562, 2566, 49 L.Ed.2d 520 (1976) (Age does not rise to the level of a suspect or quasi-suspect class: it is a stage of life through which all persons go.).

the statute—necessitates a high level of clarity by Congress. But, as the Supreme Court has observed, such a requirement of Congress is not too high when considering the important interests protected by the Eleventh Amendment. The Eleventh Amendment recognizes that States, as a matter of constitutional law, are special entities—still possessing attributes of sovereignty. The Amendment strikes a balance between the federal government and the States. To alter that balance, Congress must be unmistakably clear in its intent. See *Dellmuth v. Muth*, 491 U.S. at 226, 109 S.Ct. at 2400.

No unequivocal expression of an intent to abrogate immunity is unmistakably clear in the ADEA. No reference to the Eleventh Amendment or to States’ sovereign immunity is included. Nor is there, in one place, a plain, declaratory statement that States can be sued by individuals in federal court. To me, an intent on the part of Congress to abrogate the States’ constitutional right to immunity is not sufficiently clear to be effective under Eleventh Amendment jurisprudence.<sup>9</sup>

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<sup>9</sup> The ADEA presents a different situation from the one in *Seminole*, where the Court held that Congress clearly expressed its intent to abrogate immunity when Congress said, among other things, that jurisdiction was vested in “[t]he United States district courts . . . over any cause of action . . . arising from the failure of a State to enter into negotiations . . . or to conduct such negotiations in good faith. . . .” Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(7)(A)(1) (emphasis added). This section, along with the remedial scheme available to a tribe that files suit under section 2710, leaves no doubt “as to the identity of the defendant in an action under [this section].” *Seminole*, 517 U.S. at 56, 116 S.Ct. at 1124.

Unlike the ADEA, the Indian Gaming Regulatory Act at issue in *Seminole* creates a scheme of federal regulation of Indian-tribe gambling. Other than the suits authorized against States for their lack of good faith negotiations for Tribal-State compacts, the only enforcement provision of the Act is a civil fine that can be imposed by the Commission created by the Act. Thus, the only suits available to an entity other than the Commission are available to Indian

In one section, 29 U.S.C. § 630, the ADEA defines employers to include States. In a different section, 29 U.S.C. § 626(b), which never mentions employers much less mentions States as defendants, the ADEA separately provides for enforcement by means of suits for legal or equitable relief in courts of competent jurisdiction. This statutory structure does not provide the clarity needed to abrogate States' constitutional right to sovereign immunity. For abrogation to be unmistakably clear, it should not first be necessary to fit together various sections of the statute to create an expression from which one might infer an intent to abrogate. Although we make no definite rule about it, the need to construe one section with another, by its very nature, hints that no *unmistakable* or *unequivocal* declaration is present. More important, when we do construe the various ADEA sections together, abrogation never becomes "as clear as is the summer's sun."<sup>10</sup>

"A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." See *Seminole*, 517 U.S. at 54, 116 S.Ct. at 1123 (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 244, 105 S.Ct. 2142, 3149, 87 L.Ed.2d 171 (1985)). "[T]hat Congress grants jurisdiction to hear a claim does not suffice to show Con-

tribes. And the only entities that the tribes can sue under the Act are States: no other means of enforcement are established.

The single-mindedness of the Act adds much clarity to its words. The ADEA, on the other hand, is more complicated. As a general proposition, it doubtlessly permits suits against a wide range of employers (public and private) and for various remedies (legal and equitable) and in different forums (state and federal courts). But this fact sheds little light on the narrow question of suits by individuals against States in federal court.

<sup>10</sup> For background, see William Shakespeare, *King Henry the Fifth* act 1, sc. 2 (speech of Canterbury outlining Henry's claim to the French throne).

gress has abrogated all defenses to that claim." *Blatchford*, 501 U.S. at 786 n.4, 111 S.Ct. at 2585 n.4.

Still, Plaintiffs argue, and all three district courts seemed to agree, that Congress's amendments to the ADEA in 1974—adding States, their agencies, and political subdivisions to the definition of "employer" (along with the original portions of the ADEA providing that the statute may be enforced in courts of competent jurisdiction)—represents the unmistakably clear legislative statement required to abrogate the Eleventh Amendment. This view (which is opposed by the State in *Dickson*) seems to clash with the Supreme Court's precedents.

In *Employees of the Dep't of Public Health and Welfare v. Missouri*, 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973), the Supreme Court held that the Fair Labor Standards Act ("FLSA") did not provide a sufficiently clear statement of intent to abrogate the Eleventh Amendment. As initially enacted, the FLSA (like the ADEA) did not apply at all to States. In 1966, the FLSA was amended to include certain State agencies in the definition of employer. This amendment, the Court held, did not provide the clear statement of intent to abrogate immunity, despite the provisions allowing suits in courts of "competent jurisdiction" against employers who violated the FLSA. *Id.* at 281, 93 S.Ct. at 1617. "The history and tradition of the Eleventh Amendment indicate that by reason of that barrier a federal court is not competent to render judgment against a nonconsenting State." *Id.* Like the ADEA, there was no dispute that the FLSA applied to the State agencies set out in the FLSA; the dispute was only about what kinds of enforcement were available when dealing with States as defendant-employers.<sup>11</sup>

<sup>11</sup> The ADEA's 29 U.S.C. § 626(b) refers to sections of a different Act, the FLSA, particularly to some of the FLSA enforcement provisions at issue in *Employees*. This statutory structure is hardly straightforward. In 1974, after *Employees*, Congress amended the FLSA. Those amendments changed the FLSA's enforcement provi-



In a later decision, *Dellmuth v. Muth*, the Supreme Court held that the Education of the Handicapped Act (EHA) did *not* abrogate Eleventh Amendment immunity despite provisions allowing suit in federal district court and many provisions referring to the States as parties in suits of enforcement. See *Dellmuth*, 491 U.S. at 226-27, 109 S.Ct. at 2400-02. That the pertinent statute (like the ADEA) never mentioned either "the Eleventh Amendment or the States' sovereign immunity" was given weight. *Id.* at 230, 109 S.Ct. at 2402. Abrogation was not sufficiently clear. *Id.*

To include the States as employers under the ADEA, as in the FLSA, does not show an intent that the States be sued by private citizens in federal court—the kind of suit prohibited under the Eleventh Amendment.<sup>12</sup> The ADEA is enforceable against the States, despite sovereign immunity, through forms of relief other than direct suits by citizens in federal court.<sup>13</sup> Congress may have had

sion to provide that suits could be brought against "employers (including a public agency)" in "any Federal or State court of competent jurisdiction." 29 U.S.C. § 216. (The FLSA as amended is similar to 29 U.S.C. 626[c][1] in the ADEA itself.) Still, a federal court lacks "competent jurisdiction" if the Eleventh Amendment prohibits the suits against the State. *Employees*, 411 U.S. at 281, 93 S.Ct. at 1617. So, making it specific that suits can be brought in federal court does not make it more clear that suits against States by private parties in federal court are in order. Other, private employers could be the intended defendants in such suits. And equitable relief might be available against state officials in federal courts. See *Edelman v. Jordan*, 415 U.S. 651, 663-64, 94 S.Ct. 1347, 1356-57, 39 L.Ed.2d 662 (1974).

<sup>12</sup> Plaintiffs' argument in this appeal mistakenly frames this issue as one of the constitutionality of the relevant statutes. The statutes' basic constitutionality is not in jeopardy. This appeal only addresses whether the ADEA and ADA can be enforced through suits by private parties in federal court against offending States.

<sup>13</sup> For examples of other methods of ensuring the States' compliance with federal law, see *Seminole*, 517 U.S. at 71 n. 14, 116 S.Ct. at 1131 n. 14.

these other forms of enforcement in mind when it amended the statute to include States as employers. Thus, the general application of the law to the States does not make the requisite clear statement that Congress also intended the ADEA to abrogate the Eleventh Amendment specifically.

I do not dispute that some provisions of the ADEA make States look like possible defendants in suits alleging violations of the ADEA. I accept that these provisions could support an "inference that the States were intended to be subject to damages actions for violations of the [ADEA]." *Dellmuth*, 491 U.S. at 230, 109 S.Ct. at 2402. But, as the Supreme Court stressed in *Dellmuth*, a permissible inference is not "the unequivocal declaration" that is required to show Congress's intent to exercise its powers of abrogation. *Id.*<sup>14</sup>

<sup>14</sup> Some circuits have held that Congress did clearly express its intent to abrogate States' immunity in the ADEA. See, e.g., *Hurd v. Pittsburg State Univ.*, 109 F.3d 1540 (10th Cir.1997); *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690 (3d Cir.1996); *Davidson v. Board of Governors of State Colleges and Univs.*, 920 F.2d 441 (7th Cir.1990); *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694 (1st Cir.1983). I respect their views. These courts determined that the amendments adding States to the definition of "employer," read in connection with enforcement provisions permitting suits against violators of the ADEA, made it sufficiently clear that Congress intended to abrogate Eleventh Amendment immunity: Compare 29 U.S.C. § 623 (describing what conduct is unlawful) with 626(b), (c) (permitting civil suits "in any court of competent jurisdiction" for legal or equitable relief as may be appropriate to effectuate the purposes of the Act) and 630 (including States in the definition of "employer"). Although, to me, these courts are drawing a permissible inference from the statute, I cannot agree that the ADEA's language includes an unequivocal declaration of abrogation of States' immunity as required by the Constitution and the Supreme Court. It is just not "unmistakably clear" to me. See generally *Humenansky v. Board of Regents of the Univ. of Minnesota*, 958 F.Supp. 439 (D.Minn.1997) (also concluding the ADEA lacks the necessary "unequivocal declaration" of intent to abrogate).

I conclude that nothing in the ADEA indicates a truly clear intent by Congress to abrogate Eleventh Amendment immunity and, thus, States are entitled to immunity from suits by private citizens in federal court under the ADEA.

## II. *Americans With Disabilities Act*

In sharp contrast to the ADEA, the ADA does include a clear statement of intent to abrogate Eleventh Amendment immunity: "A State shall not be immune under the eleventh amendment . . ." 42 U.S.C. § 12202.<sup>15</sup>

Thus, the only argument that Eleventh Amendment immunity still exists is that the ADA was not enacted pursuant to the Fourteenth Amendment. We are not persuaded by this argument.

Unlike the ADEA, it is plain that Congress was invoking its Fourteenth Amendment enforcement powers when it enacted the ADA. See 42 U.S.C. § 12101(b) ("It is the purpose of this chapter . . . (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment. . ."). Congress specifically found that "individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful

<sup>15</sup> I do not say that certain magic words must be used to abrogate immunity. I accept that Congress could unmistakably signal abrogation of immunity in a variety of ways, and we write no general rules today. See 42 U.S.C. § 2000e-5(f)(1) (where Title VII speaks of suits by aggrieved persons against "a government, governmental agency, or political subdivision" while discussing suits in federal district courts) and *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452, 96 S.Ct. 2666, 2670, 49 L.Ed.2d 614 (1976) (concluding that Title VII abrogates Eleventh Amendment immunity). But when considering abrogation in both the ADEA and the ADA, I cannot help but see the clarity with which Congress addressed sovereign immunity in the ADA. Comparing the language of these two statutes further spotlights the ambiguous nature of the ADEA's treatment of Eleventh Amendment immunity.

unequal treatment." 42 U.S.C. § 12101(a)(7).<sup>16</sup> We accept Congress's analysis of the situation addressed by the ADA and agree with the courts that have addressed the issue: the ADA was properly enacted under Congress's Fourteenth Amendment enforcement powers. See, e.g., *Amos v. Maryland Dep't of Pub. Safety and Correctional Servs.*, 126 F.3d 589, 603 (4th Cir.1997).<sup>17</sup>

## Conclusion

The Eleventh Amendment is an important part of the Constitution. It stands for the constitutional principle that State sovereign immunity limits the federal courts' jurisdiction under Article III. As such, Congress must make an unmistakably clear statement of its intent before a federal court can accept that States have been stripped of their constitutionally granted sovereign immunity. For me, the ADEA contains no unequivocally clear statement of such intent. The ADA does. And the ADA was enacted under the authority of the Fourteenth Amendment.

For the reasons stated in our combined opinions, we hold that the ADEA does not abrogate States' Eleventh Amendment immunity but that the ADA does do so. Therefore, in *Kimel*, we REVERSE and REMAND for dismissal. In *Dickson*, we AFFIRM in part and REVERSE in part and REMAND for further proceedings. In *MacPherson*, we AFFIRM the district court's decision.

<sup>16</sup> By the way, an express invocation of Fourteenth Amendment powers is not present in the ADEA. Nor did Congress make findings in the ADEA that persons of a particular age constitute a discrete and insular minority.

<sup>17</sup> In *Kimel*, the State presents one further issue: That should we determine the ADEA suit cannot be maintained against the State, we should remand with instructions to the district court to dismiss the supplemental state claim under the Florida Human Rights Act. That is the proper decision, and that claim is remanded to the district court with instructions that it be dismissed. See *Eubanks v. Gerwen*, 40 F.3d 1157, 1161-62 (11th Cir.1994).



HATCHETT, Chief Judge, concurring in judgment in part, dissenting in part:

I would hold that Congress effectively abrogated the states' sovereign immunity under the Eleventh Amendment of the United States Constitution in both the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, and the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213. I therefore respectfully dissent from Part I of the Discussion in Judge Edmondson's opinion, holding that because states are entitled to sovereign immunity under the Eleventh Amendment, private citizens are precluded from bringing lawsuits against such entities in federal court under the ADEA.<sup>1</sup> I concur, however, in the result of Part II of Judge Edmondson's Discussion, concluding that the states are not entitled to Eleventh Amendment immunity from federal lawsuits under the ADA. I disagree with Judge Cox's analysis in its entirety and feel compelled to address, in particular, his assertion that the ADEA and the ADA are not "valid enforcement" legislation pursuant to Congress's power under Section 5 of the Fourteenth Amendment.<sup>2</sup>

Congress may exercise its power to abrogate the states' Eleventh Amendment immunity if (1) it "has 'unequivocally expresse[d] its intent to abrogate the immunity'"; and (2) it "has acted 'pursuant to a valid exercise of power.'" *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54, 116 S.Ct. 1114, 1122, 134 L.Ed.2d 252, 266

<sup>1</sup> For the sake of brevity, I will use the term "states" to refer to states and their agencies and instrumentalities.

<sup>2</sup> Because Judge Cox provides the determining vote that states are entitled to sovereign immunity under the ADEA—albeit for a reason different from that of Judge Edmondson—my opinion with respect to the court's ADEA analysis is a dissent. With regard to the ADA, however, I merely write separately to uphold the applicability of that statute to the states, as did Judge Edmondson.

(1996) (quoting *Green v. Mansour*, 474 U.S. 64, 68, 106 S.Ct. 423, 425, 88 L.Ed.2d 371 (1985)) (alteration in original). Congress must make its intent "unmistakably clear in the language of the statute." *Seminole Tribe*, 517 U.S. at 54, 116 S.Ct. at 1122, 134 L.Ed.2d at 266 (quoting *Dellmuth v. Muth*, 491 U.S. 223, 228, 109 S.Ct. 2397, 2400, 105 L.Ed.2d 181 (1989)). If the court finds that Congress clearly expressed its intent to abrogate the states' immunity, the next inquiry is whether Congress enacted the legislation in question "pursuant to a constitutional provision granting [it] the power to abrogate[.]" *Seminole Tribe*, 517 U.S. at 58, 116 S.Ct. at 1124, 134 L.Ed.2d at 268.<sup>3</sup> A statute is "appropriate legislation" to enforce the Equal Protection Clause of the Fourteenth Amendment if it "may be regarded as an enactment to enforce the Equal Protection Clause, [if] it is 'plainly adapted to that end' and [if] it is not prohibited by but is consistent with 'the letter and spirit of the constitution.'" *Clark v. California*, 123 F.3d 1267, 1270 (9th Cir.) (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966)) (alterations in original), *petition for cert. filed*, 66 U.S.L.W. 3308 (U.S. Oct. 20, 1997) (No. 97-686).

## I. Congress's Intent to Abrogate the States' Immunity

### A. The ADEA

The ADEA makes it unlawful for an "employer" "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect

<sup>3</sup> In *Seminole Tribe*, the Supreme Court overruled *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989), and held that Congress has no authority to abrogate the states' sovereign immunity when acting pursuant to the Commerce Clause, but can abrogate their immunity under Section 5 of the Fourteenth Amendment. 517 U.S. at 58, 63, 116 S.Ct. at 1125, 1128, 134 L.Ed.2d at 268, 273.

to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's age[.]” 29 U.S.C. § 623(a)(1) (1994). In 1974, Congress amended the definition of “employer” to include “a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State,” and deleted text explicitly excluding such entities from that definition. 29 U.S.C. § 630(b)(2) & note (1994).<sup>4</sup> The ADEA explicitly provides that employers who violate the statute are subject to liability for legal and equitable relief. See 29 U.S.C. § 626(b) (1994) (“In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter. . . .”); 29 U.S.C. § 626(c)(1) (1994).

I agree with the parties in *Kimel*—including the Florida Board of Regents—and with virtually every other court that has addressed the question, including all three district courts in the underlying cases, that Congress made an “unmistakably clear” statement of its intent to abrogate the states’ sovereign immunity in the ADEA. See *Hurd v. Pittsburgh State Univ.*, 109 F.3d 1540, 1544 (10th Cir.1997); *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 695 (3d Cir.1996); *Davidson v. Board of Governors of State Colleges & Univs., for W. Ill. Univ.*, 920 F.2d 441, 443 (7th Cir.1990). “Unless Congress had said in so many words that it was abrogating the states’ sovereign immunity in age discrimination cases—and that degree of explicitness is not required—it could not have made its desire to override the states’ sovereign immunity clearer.” *Davidson*, 920 F.2d at 443 (internal citations omitted); see also Edmondson, J., at 2398 n.15 (“I do not say that certain magic words must be

<sup>4</sup> As a result, “employee” under the ADEA includes those persons who work for states and their agencies. See 29 U.S.C. § 630(f) (1994) (with some exceptions, “[t]he term ‘employee’ means an individual employed by any employer. . . .”).

used to abrogate immunity. I accept that Congress could unmistakably signal abrogation of immunity in a variety of ways, and we write no general rules today.”). As the Third Circuit persuasively pointed out, “[t]he statute simply leaves no room to dispute whether states and state agencies are included among the class of potential defendants when sued under the ADEA for their actions as ‘employers’” *Blanciak*, 77 F.3d at 695; see also *Seminole Tribe*, 517 U.S. at 57, 116 S.Ct. at 1124, 134 L.Ed.2d at 266-67 (relying on the references to the “State” in the text of the statute in question to conclude that such references “[made] it indubitable that Congress intended through the Act to abrogate the States’ sovereign immunity from suit”).<sup>5</sup>

<sup>5</sup> I disagree that *Employees of the Dep’t of Public Health & Welfare v. Department of Public Health & Welfare*, 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973), concluding that Congress did not clearly express its intent to abrogate the states’ immunity in enacting the 1966 amendments to the Fair Labor Standards Act (FLSA), calls into question Congress’s intent to abrogate the states’ immunity under the ADEA. In 1974, Congress specifically amended the FLSA to address the concerns of the *Employees* Court and to authorize lawsuits against the states in federal court. See *Mills v. Maine*, 118 F.3d 37, 42 (1st Cir.1997) (stating that “we agree with the other courts of appeals that have examined the FLSA’s provisions and have concluded that the Act contains the necessary clear statement of congressional intent to abrogate state sovereign immunity”); *Hurd*, 109 F.3d at 1544 n. 3; *Reich v. New York*, 3 F.3d 581, 590, 591 (2d Cir.1993) (stating that “Congress amended [the FLSA] with the intent that states and their political subdivisions would thereafter be subject to suit in federal court for violations of the FLSA[,]” and finding that “Congress has made its intent to abrogate the states’ sovereign immunity abundantly clear in the language of the FLSA, as amended in 1974 and 1985”), *cert. denied*, 510 U.S. 1163, 114 S.Ct. 1187, 127 L.Ed.2d 537 (1994), *overruled on other grounds*, *Close v. New York*, 125 F.3d 31, 38 (2d Cir.1997) (“[W]e can no longer justify congressional abrogation under the Interstate Commerce Clause, and to the extent that *Reich* permits such abrogation, we hold *Reich* is no longer good law.”); *Hale v. Arizona*, 993 F.2d 1387, 1391 (9th Cir.) (*en banc*) (stating that Congress clearly intended to abrogate the states’ sovereign immu-



I take issue with my colleague's reliance on the facts that "[n]o reference to the Eleventh Amendment or to States' sovereign immunity is included [in the ADEA,]" "[n]or is there, in one place, a plain, declaratory statement that States can be sued by individuals in federal court." Edmondson, J., at 2395. Although Judge Edmondson states that we do not require Congress to use any "magic words" to abrogate effectively the states' sovereign immunity, and that Congress may "unmistakably signal abrogation of immunity in a variety of ways," I believe that his opinion, in essence, is requiring exactly that. Edmondson, J., at 2398 n. 15. If Congress has not sufficiently expressed its intent to abrogate the states' immunity through including "States" in the definition of "employer" in the ADEA, after this decision, I cannot imagine in what other "variety of ways" Congress can signal the abrogation of the states' immunity, other than through the use of "magic words." The Court in *Seminole Tribe* did not require that Congress use any talismanic language to express its intent to abrogate, and could easily have done so. As I do not believe that *Seminole Tribe* requires Congress to use any particular words to express effectively its intent to abrogate the states' immunity, and because I believe that Congress's intent is clear in the language of the ADEA, I conclude that the first criterion of *Seminole Tribe* is satisfied. See *EEOC v. Wyoming*, 460 U.S. 226, 243 n. 18, 103 S.Ct. 1054, 1064 n. 18, 75 L.Ed.2d 18 (1983) ("[T]here is no doubt what the intent of Congress was: to extend the application of the ADEA to the States."); *Gregory v. Ashcroft*, 501 U.S. 452, 467, 111 S.Ct. 2395, 2404, 115 L.Ed.2d 410 (1991) ("[The] ADEA plainly covers all state employees except those excluded by one of the exceptions."); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452, 96 S.Ct. 2666, 2669, 49 L.Ed.2d 614 (1976) (concluding that Congress's designation of states

nity in the 1974 amendments to the FLSA), *cert. denied*, 510 U.S. 946, 114 S.Ct. 386, 126 L.Ed.2d 335 (1993).

as parties in Title VII was sufficient to abrogate the states' immunity).

## B. The ADA

The ADA presents an easier case under *Seminole Tribe*'s "clear statement" standard, as both Judges Edmondson and Cox agree. See Edmondson, J., at 2398 n. 15; Cox, J., at 2412-13. Within the statute's text, Congress explicitly provided:

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

42 U.S.C. § 12202 (1994). Accordingly, I find that Congress "unequivocally expressed" its intent to abrogate the states' sovereign immunity in section 12202 of the ADA. See *Autio v. AFSCME, Local 3139*, No. 97-3145 (8th Cir. Apr. 9, 1998); *Coolbaugh v. Louisiana*, 136 F.3d 430, 433 (5th Cir.1998) (finding Congress's intent to abrogate the states' immunity under the ADA "patently clear"); *Clark*, 123 F.3d at 1269-70.<sup>6</sup>

## II. Congress's Power to Abrogate the States' Immunity

In addition to clearly expressing its intent, Congress also must have acted pursuant to its authority under Section 5 of the Fourteenth Amendment to abrogate

<sup>6</sup> I must emphasize, however, that I do not conclude, or imply, that Congress is *required* to use any "magic words" to express effectively its intent to abrogate the states' immunity. I conclude only that Congress's intent under the ADA is clear.

successfully the states' Eleventh Amendment immunity. See *Seminole Tribe*, 517 U.S. at 58, 116 S.Ct. at 1124, 134 L.Ed.2d at 268. Judge Cox asserts that, regardless of whether Congress clearly expressed its intent to abrogate the states' immunity from lawsuits in federal court under both the ADEA and the ADA, Congress lacks the constitutional authority to do so under these statutes, relying on the Supreme Court's recent decision in *City of Boerne v. Flores*, — U.S. —, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). In *Boerne*, the Supreme Court held that Congress exceeded its Section 5 authority in enacting the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb to 2000bb-4, through which Congress sought to reinstate a previous, more stringent standard of review for free exercise of religion claims.<sup>7</sup> The Court found that Congress was not *enforcing* rights under the Fourteenth Amendment, which it undeniably has the power to do, but was attempting to *create* rights that the Constitution did not guarantee. See *Boerne*, — U.S. at —, 117 S.Ct. at 2170, 138 L.Ed.2d at 646. In

<sup>7</sup> In *Employment Division, Dep't of Human Resources v. Smith*, 494 U.S. 872, 883-87, 110 S.Ct. 1595, 1602-04, 108 L.Ed.2d 876 (1990), the Supreme Court declined to apply the balancing test for analyzing free exercise claims set forth in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), and held that "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest." *Boerne*, — U.S. at —, 117 S.Ct. at 2161, 138 L.Ed.2d at 635. Congress then enacted the RFRA, seeking "to restore the compelling interest test as set forth in *Sherbert*[,] . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened. . . ." 42 U.S.C. § 2000bb(b)(1) (1994). Thus, "[the] RFRA prohibit[ed] '[g]overnment' from 'substantially burden[ing]' a person's exercise of religion even if the burden result[ed] from a rule of general applicability unless the government [could] demonstrate the burden '(1) [was] in furtherance of a compelling governmental interest; and (2) [was] the least restrictive means of furthering that compelling governmental interest.'" *Boerne*, — U.S. at —, 117 S.Ct. at 2162, 138 L.Ed.2d at 636 (quoting 42 U.S.C. § 2000bb-1).

other words, Congress had impermissibly enacted "substantive" legislation. Judge Cox states that "*Boerne* and the Voting Rights Act cases teach us [that] [o]nly by respecting Supreme Court interpretations of the Fourteenth Amendment can Congress avoid impermissibly interpreting the Amendment itself." Cox, J., at 2414. I interpret his analysis to limit, in an unallowable manner, the power of Congress and thus, disagree.

#### A. The ADEA

Judge Cox asserts that the ADEA was not a proper exercise of Congress' Section 5 power under the *Boerne* analysis for two main reasons. First, he alleges that the statute confers more extensive rights to individuals than does the Equal Protection Clause of the Fourteenth Amendment. In essence, Judge Cox alleges that the ADEA puts "mandatory retirement ages" and "mandatory age limits" to a much more rigorous test than the Equal Protection Clause requires. Cox, J., at 2415-16. In addition, Judge Cox asserts that "Congress did not enact the ADEA as a proportional response to any widespread violation of the elderly's constitutional rights[.]" because, among other reasons, the legislative history accompanying the 1974 amendment to the ADEA did not mention the Constitution or constitutional violations. Cox, J., at 2415, 2416-17.

To the contrary, like many other circuit courts, I conclude that the ADEA falls squarely within the enforcement power that Section 5 of the Fourteenth Amendment confers on Congress. See *Hund*, 109 F.3d at 1545-46; *Ramirez v. Puerto Rico Five Serv.*, 715 F.2d 694, 699-700 (1st Cir.1983); *EEOC v. Elrod*, 674 F.2d 601, 608-09 (7th Cir.1982); *Arritt v. Grisell*, 567 F.2d 1267, 1270-71 (4th Cir.1977). Congress enacted the ADEA to remedy and prevent what it found to be a pervasive problem of arbitrary discrimination against older workers. Such



protection is at the core of the Fourteenth Amendment's guarantee of equal protection under the law. Even though Congress arguably has gone further in proscribing government employment practices that discriminate on the basis of age than have the courts in adjudicating claims under the Fourteenth Amendment, this merely reflects the differing roles of Congress and the courts.

1. *Congress enacted the ADEA to "enforce" rights under the Equal Protection Clause of the Fourteenth Amendment.*

In *Boerne*, Congress legislated a constitutional standard of review for the judiciary. Contrary to Judge Cox's assertions, I do not find this to be the case under the ADEA. In general, the Equal Protection Clause proscribes states from treating similarly situated persons within their jurisdictions differently and assures that governments will differentiate between their citizens only upon reasonable grounds that have a relationship to the desired goals. *See, e.g., Romer v. Evans*, 517 U.S. 620, 630-32, 116 S.Ct. 1620, 1627-28, 134 L.Ed.2d 855, 865-67 (1996); *Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S.Ct. 2326, 2331, 120 L.Ed.2d 1 (1992); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446, 105 S.Ct. 3249, 3257, 87 L.Ed.2d 313 (1985) ("The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."). Although age is not a "suspect" or quasi-suspect classification deserving of close judicial scrutiny under the Equal Protection Clause, the Fourteenth Amendment's equal protection guarantees are not limited solely to members of a few protected groups.<sup>8</sup>

<sup>8</sup> Under the Equal Protection Clause, arbitrary state action can burden the rights of older individuals on the basis of age if the action passes the rational basis test, *i.e.*, it is rationally related to a legitimate government interest. *See Gregory*, 501 U.S. at 470-71, 111 S.Ct. at 2405-06.

*See, e.g., Cleburne*, 473 U.S. at 447, 105 S.Ct. at 3258 ("[T]he [disabled], like others, have and retain their substantive constitutional rights in addition to the right to be treated equally by the law."). Every person has a right to be free from government classifications based on arbitrary or irrational criteria, and Congress's power is not limited to "the protection of those classes found by the Court to deserve 'special protection' under the Constitution." *Clark*, 123 F.3d at 1270-71. *But cf. Wilson-Jones v. Caviness*, 99 F.3d 203, 210 (6th Cir.1996) (stating that the court will not "regard" a legislation that does not affect a judicially-recognized "specially protected" class, as an enactment "to enforce the Equal Protection Clause" unless Congress explicitly stated that it is enforcing that clause), *amended on other grounds*, 107 F.3d 358 (1997).

Additionally, Congress has not exceeded its authority to enforce the Equal Protection Clause simply because the ADEA may impose liability involving distinctions based on age that a court would not find to be "irrational" under that clause. It is undisputed that Congress's power to enforce the rights to equal protection of the law under Section 5 is not unlimited. Congress cannot "decree the substance of the Fourteenth Amendment's restrictions on the States[,] or alter 'what the right[s][are].'" *Boerne*, — U.S. at —, 117 S.Ct. at 2164, 138 L.Ed.2d at 638. It has long been established, however, that "[l]egislation which deters and remedies constitutional violations can fall within the sweep of Congress' enforcement power *even if in the process it prohibits conduct which is not itself unconstitutional* and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" *Boerne*, — U.S. at —, 117 S.Ct. at 2163, 138 L.Ed.2d at 637 (quoting *Fitzpatrick*, 427 U.S. at 455, 96 S.Ct. at 2670) (emphasis added). The *Boerne* Court cited, as an example, its upholding the suspension of various voting requirements, such as literacy tests, under Congress's

parallel power to enforce the Fifteenth Amendment to combat racial discrimination in voting "despite the facial constitutionality of the tests under *Lassiter v. Northhampton County Bd. of Elections*, 360 U.S. 45, 79 S.Ct. 985, 3 L.Ed.2d 1072 (1959)." *Boerne*, — U.S. at —, 117 S.Ct. at 2163, 138 L.Ed.2d at 637; *see also Scott v. City of Anniston*, 597 F.2d 897, 899, 900 (5th Cir.1979) ("The fourteenth amendment empowers Congress to enact appropriate legislation establishing more exacting requirements than those minimum safeguards provided in the amendment[.]" as long as Congress does so "to carry out the purpose of [the] amendment[.]"), *cert. denied*, 446 U.S. 917, 100 S.Ct. 1850, 64 L.Ed.2d 271 (1980). Courts must accord Congress "wide latitude" in determining where to draw the line between measures that prevent or remedy unconstitutional actions and those that make substantive changes in the governing law. *Boerne*, — U.S. at —, 117 S.Ct. at 2163, 138 L.Ed.2d at 638.

Thus, it is clear that Congress does not merely have to "rubber stamp" the constitutional violations that the Supreme Court has already found to exist; nor does it have to legislate to remedy only that conduct that the Court would find unconstitutional, even though the Court has not yet so ruled. *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314, 96 S.Ct. 2562, 2567, 49 L.Ed.2d 520 (1976) (stating in dicta that the rational-basis inquiry "reflect[s] the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one").<sup>9</sup> Such an interpretation would essentially render meaningless Congress's power to enforce the Fourteenth Amendment, which is separate and distinct from the power of the judiciary to interpret the Constitution. *See Katzenbach*, 384 U.S. at 648-49, 86 S.Ct. at 1721-22.

<sup>9</sup> At issue in *Murgia* was the constitutionality under the Equal Protection Clause of a state statute mandating a retirement age for state police officers. *See* 427 U.S. at 308, 96 S.Ct. at 2563.

In *Katzenbach v. Morgan*, the Supreme Court rejected the state's argument that section 4(e) of the Voting Rights Act could not be sustained as appropriate legislation to enforce the Equal Protection Clause unless the courts decided that the clause forbade that section's English literacy requirement. 384 U.S. at 648-50, 86 S.Ct. at 1721-22. The Court stated:

A construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the [Fourteenth] Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment. It would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judicial by particularizing the "majestic generalities" of § 1 of the Amendment.

*Katzenbach*, 384 U.S. at 648-49, 86 S.Ct. at 1721-22 (footnote omitted). I decline to read such a limitation of Congress's power into the *Boerne* decision, and find any assertion that the ADEA may not reach practices that are not themselves unconstitutional simply to be wrong.

2. *The ADEA is an appropriate, proportional remedial measure to address age discrimination.*

In order for the courts to consider legislation to be "remedial," and not substantive, in nature, "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end" must exist. *Boerne*, — U.S. at —, 117 S.Ct. at 2164, 138 L.Ed.2d at 638. After reviewing the text and legislative history of the ADEA and its amendments, I conclude that Congress, in addressing arbitrary age discrimination in employment, satisfied this requirement. *See generally*



*Wyoming*, 460 U.S. at 229-33, 103 S.Ct. at 1056-58 (discussing the ADEA's legislative history); *Elrod*, 674 F.2d at 604-07 (same).

The preamble to the ADEA provides Congress's findings regarding, among other things, "arbitrary age limits regardless of potential for job performance [that] has become a common practice," and "arbitrary discrimination in employment because of age," and states that one of the Act's purposes is to prohibit such discrimination. 29 U.S.C. § 621 (1994). In the 1950s, Congress began its endeavors to prohibit arbitrary age discrimination. See *Wyoming*, 460 U.S. at 229, 103 S.Ct. at 1056. During floor debates concerning the enactment of Title VII of the Civil Rights Act of 1964, amendments to include age along with Title VII's protected classes were rejected "in part on the basis that Congress did not yet have enough information to make a considered judgment about the nature of age discrimination[.]" *Wyoming*, 460 U.S. at 229, 103 S.Ct. at 1056 (citing 110 Cong. Rec. 2596-99, 9911-13, 13490-92 (1964)). Congress thus directed the Secretary of Labor (Secretary) to conduct a "full and complete" study on age discrimination in employment. *Wyoming*, 460 U.S. at 230, 103 S.Ct. at 1057. The Secretary issued the report about a year later, finding, among other things, that (1) employment age discrimination was generally based on unsupported stereotypes and was often defended on pretextual grounds; and (2) the empirical evidence showed that arbitrary age limits were unfounded overall, as older workers on average, performed as well as younger workers. *Wyoming*, 460 U.S. at 230-31, 103 S.Ct. at 1057-58. Thereafter, committees in the Senate and the House of Representatives conducted extensive hearings on proposed legislation prohibiting such discrimination, and the Secretary's findings "were confirmed throughout the extensive factfinding undertaken by the Executive Branch and Congress." *Wyoming*, 460 U.S. at 230-31, 103 S.Ct. at 1057-58.

In March 1972, around the same time that Congress considered and passed amendments under Section 5 extending Title VII's application to state and local government employees, Senator Bentsen first introduced legislation to extend the ADEA to government employees. *Elrod*, 674 F.2d at 604 (citing 118 Cong. Rec. 7745 (1972), and Equal Employment Opportunity Act of 1972, Pub.L. No. 92-261, 86 Stat. 103). After Senator Bentsen again presented the proposed amendment in May 1972, arguing that Title VII's underlying principles were "directly applicable" to the ADEA, the Senate voted unanimously in favor of the ADEA amendment. *Elrod*, 674 F.2d at 604-05 (citing 118 Cong. Rec. 15894, 15895 (1972)). The amendment, however, initially failed to pass House-Senate conference committees. *Elrod*, 674 F.2d at 605. Although little legislative history exists concerning the 1974 amendment to the ADEA, and Congress made no mention to a specific constitutional provision, both the House and the Senate cited President Nixon's remarks in 1972 to indicate the congressional purpose of the amendment:

Discrimination based on age—what some people call "age-ism"—can be as great an evil in our society as discrimination based on race or religion or any other characteristic which ignores a person's unique status as an individual and treats him or her as a member of some arbitrarily-defined group. Especially in the employment field, discrimination based on age is cruel and self-defeating; it destroys the spirit of those who want to work and it denies the Nation[] the contribution they could make if they were working.

*Elrod*, 674 F.2d at 605 (quoting S.Rep. No. 93-690, 93d Cong., 2d Sess. 55 (1974), and H.R.Rep. No. 93-913, 93d Cong., 2d Sess., reprinted in [1974] U.S.C.C.A.N. 2811, 2849).<sup>10</sup> In addition, Senator Bentsen commented

<sup>10</sup> The amendments to the FLSA that, among other things, extended that statute to federal, state and local government employ-

that "[t]he passage of [the ADEA amendment] insures that Government employees will be subject to the same protections against arbitrary employment [discrimination] based on age as are employees in the private sector." *Elrod*, 674 F.2d at 605 (quoting 120 Cong. Rec. 8768 (1974)).<sup>11</sup>

In light of the above, I conclude that the ADEA qualifies as a valid enforcement provision under Congress's Section 5 power. The text and history of the ADEA demonstrate a congressional focus, including ex-

ees—and with which Congress passed the 1974 ADEA amendment—overshadowed the ADEA. The House and Senate considered the ADEA amendment to be "a logical extension of the Committee's decision to extend FLSA coverage to Federal, State, and local government employees." *Elrod*, 674 F.2d at 605 (internal quotation marks omitted). Even in light of this and the Supreme Court's concluding that Congress passed the ADEA pursuant to its power under the Commerce Clause, my determination that Congress also was exercising its power under Section 5 of the Fourteenth Amendment in enacting the ADEA is not precluded. See *Wyoming*, 460 U.S. at 243, 103 S.Ct. at 1064 ("The extension of the ADEA to cover state and local governments, both on its face and as applied in this case, was a valid exercise of Congress' powers under the Commerce Clause. We need not decide whether it could also be upheld as an exercise of Congress' powers under § 5 of the Fourteenth Amendment.") (emphasis added); *Hurd*, 109 F.3d at 1546 (concluding, after *Wyoming*, that "Congress acted pursuant to its powers under the Fourteenth Amendment when it applied the ADEA to the states"); *Ramirez*, 715 F.2d at 700 (holding post *Wyoming* that Congress adopted the 1974 ADEA amendment pursuant to its Section 5 power).

<sup>11</sup> In addition, included in the legislative history of the 1978 ADEA amendments is a statement from Representative Paul Findley further supporting the view that Congress's legislation in the ADEA was part of its general policy to ensure equal employment opportunities. Representative Findley stated that "depriving older and still capable Americans of jobs [does not] make any more sense than discriminating in employment against blacks, women, or religious or ethnic minorities." *Elrod*, 674 F.2d at 606 (quoting H.R. Rep. No. 95-527, Part I, 95th Cong., 1st Sess., reprinted in [1978] 753 Gov't Empl. Rel. Rep. (BNA) 101, 103).

tensive fact-finding on arbitrary age discrimination, and its resulting harm, in the employment practices of private and public employers—discrimination that had become a "common practice" and was often unrelated to legitimate employment goals. See 29 U.S.C. § 621 (1994). "[I]t is clear that the purpose of the [1974 amendment to the ADEA] was to prohibit arbitrary, discriminatory government conduct that is the very essence of the guarantee of 'equal protection of the laws' of the Fourteenth Amendment." *Elrod*, 674 F.2d at 604; see also *Ramirez*, 715 F.2d at 699 (stating that Congress extended ADEA coverage "to shield public employees from the invidious effects of age-based discrimination. The 1974 amendment, like the ADEA itself, "is aimed at irrational, unjustified employment decisions based upon assumptions about the relationship between age and ability which classify older workers as incapable of effective job performance.'") (quoting *Elrod*, 674 F.2d at 605)).<sup>12</sup>

## B. The ADA

With respect to the ADA, Judge Cox states that the statute is not valid enforcement legislation for the same reasons that he rejected the ADEA. First, he asserts that because the disabled are not a suspect or quasi-suspect class, and thus enjoy no special rights under the Equal

<sup>12</sup> The fact that employers can defend their age-based classifications on the grounds that such classifications are related to a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business" or are "based on reasonable factors other than age," supports the proposition that the ADEA only targets arbitrary age discrimination, rather than every employment decision that is based on or related to age. 29 U.S.C. § 623(f)(1) (1994). Even age-based employment distinctions under disparate impact claims generally do not violate the ADEA if the distinctions serve the "legitimate employment goals of the employer." *MacPherson v. University of Montevallo*, 922 F.2d 766, 771 (11th Cir.1991) (quoting *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659, 109 S.Ct. 2115, 2125, 104 L.Ed.2d 733 (1989)).



Protection Clause, the ADA provides them with greater protection than does the Equal Protection Clause. His second reason is that the ADA "was unaccompanied by any finding that widespread violation of the disabled's constitutional rights required the creation of prophylactic remedies[.]" and states that "[a]ltruistic and economic concerns motivated [the ADA]—not defense of the Constitution." Cox, J., at 2417-18. For reasons similar to my analysis of the ADEA, I disagree.

As an initial matter, I acknowledge that, unlike in the ADEA, Congress explicitly invoked its enforcement power under the Fourteenth Amendment in the ADA. See 42 U.S.C. § 12101(b)(4) (1994) ("It is the purpose of [the ADA] . . . to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities."). I emphasize, however, that, similar to Congress's expression of its intent, Congress is not required to use any magic words to invoke its authority to enforce the Fourteenth Amendment under Section 5 before abrogating the states' immunity. See *supra* pp. 2393-94; see also *Clark*, 123 F.3d at 1271 ("Although 'the constitutionality of action taken by Congress does not depend on recitals of power which it undertakes to exercise,' we give great deference to congressional statements.") (quoting *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144, 68 S.Ct. 421, 424, 92 L.Ed. 596 (1948)). In *EEOC v. Wyoming* the Supreme Court rejected that very suggestion, and stated:

It is in the nature of our review of congressional legislation defended on the basis of Congress' power under § 5 of the Fourteenth Amendment that we be able to discern some legislative purpose or factual predicate that supports the exercise of that power. That does not mean, however, that Congress need anywhere recite the words "section 5" or "Four-

teenth Amendment" or "equal protection," see, e.g., *Fullilove v. Klutznick*, 448 U.S. 448, 476-78, 100 S.Ct. 2758, 2773-74, 65 L.Ed.2d 902 (1980) (Burger, C.J.), for "[t]he . . . constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144, 68 S.Ct. 421, 424, 92 L.Ed. 596 (1948).

460 U.S. at 243 n. 18, 103 S.Ct. at 1064 n. 18. The question, therefore, is not whether Congress explicitly relied on the Fourteenth Amendment when it enacted the ADA, but whether the statute is within Congress's authority under that amendment. See *Ramirez*, 715 F.2d at 698 ("The omission of any ritualistic incantation of powers by the Congress is not determinative, for there is no requirement that the statute incorporate buzz words . . ."); *Elrod*, 674 F.2d at 608 ("[T]he test of whether legislation is enacted pursuant to § 5 of the Fourteenth Amendment requires no talismanic intoning of the amendment. Rather, the inquiry is whether the *objectives* of the legislation are within Congress' power under the amendment.") (internal citation and footnote omitted). That being said, I now turn to the substantive analysis of the ADA.

First, I do not agree with Judge Cox's equal protection argument concerning the ADA for the same reasons I declined to accept this argument with respect to the ADEA. Although, like older individuals, the disabled are not a suspect or quasi-suspect class—and therefore are not entitled to the higher level of judicial scrutiny under the Equal Protection Clause that courts accord state action affecting such classes—the disabled are still entitled to the equal protection of the law against arbitrary discrimination as is every person. See *Cleburne*, 473 U.S. at 446, 105 S.Ct. at 3257 ("Our refusal to recognize the [disabled] as a quasi-suspect class does not leave them entirely unprotected from invidious discrimination.").



Like the Ninth Circuit, I find no authority for the idea that “the Court’s choice of a level of scrutiny for purposes of judicial review should be the boundary of the legislative power under the Fourteenth Amendment[.]” *Clark*, 123 F.3d at 1271. I therefore conclude—especially in light of the congressional history of the ADA as discussed below—that Congress did not exceed its authority in enacting that statute simply because the ADA may impose liability in situations that the courts would not find to violate judicial standards under the Equal Protection Clause. I consider the ADA to be legislation that falls within the sweep of Congress’ enforcement power to “prohibit[] conduct which is not itself unconstitutional.” *Boerne*, — U.S. at —, 117 S.Ct. at 2163, 138 L.Ed.2d at 637.

Additionally, I disagree with the assertion that Congress was not concerned with constitutional violations when it enacted the ADA, and thus that the statute is not valid enforcement legislation under its Section 5 power. The ADA is “appropriate legislation” to enforce the Equal Protection Clause, as it may be regarded as an enactment to enforce that clause, is plainly adapted to that end and “is not prohibited by but is consistent with the letter and spirit of the [C]onstitution.” *Clark*, 123 F.3d at 1270 (internal quotation marks omitted); see also *Autio v. AFSCME, Local 3139*, — F.3d —, No. 97-3145 (8th Cir. Apr. 9, 1998) (concluding that Congress validly enacted the ADA to enforce the Equal Protection Clause through the exercise of its Section 5 power); *Coolbaugh*, 136 F.3d at 438 (“[T]he ADA represents Congress’ considered efforts to remedy and prevent what it perceived as serious, widespread discrimination against the disabled.”).

Congress considered an abundance of evidence and made extensive findings in the ADA concerning the extent of the discrimination against, and resulting harm to,

the disabled to support the statute’s enactment. See *Coolbaugh*, 136 F.3d at 436-37 (stating that both the House and the Senate cited seven substantive studies or reports and “a wealth of testimonial and anecdotal evidence from a spectrum of parties to support the finding of serious and pervasive discrimination”). In particular, it found that:

- (1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;
- (2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
- (3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;
- (4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;
- (5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modification to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser serv-

ices, programs, activities, benefits, jobs, or other opportunities; [and]

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally[.]

42 U.S.C. § 12101(a) (1994); *Coolbaugh*, 136 F.3d at 435. Congress also observed that:

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

42 U.S.C. § 12101(a) (1994); *Coolbaugh*, 136 F.3d at 435 n. 3.<sup>13</sup> As the Supreme Court has stated, "It is for

<sup>13</sup> Congress's detailed findings in the ADA are one ground on which to distinguish the underlying *Dickson* case from *Boerne*, in

Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." *Boerne*, — U.S. at —, 117 S.Ct. at 2171, 138 L.Ed2d at 649 (quoting *Katzenbach*, 384 U.S. at 651, 86 S.Ct. at 1723) (alteration in original); *Coolbaugh*, 136 F.3d at 436 (Deference to the judgment of Congress is particularly appropriate in this case, because in *Cleburne*, the Court identified Congress as the ideal governmental branch to make findings and decisions regarding the legal treatment of the disabled.") (citing 473 U.S. at 442-43, 105 S.Ct. at 3255-56); *Cleburne*, 473 U.S. at 442-43, 105 S.Ct. at 3255-56 ("How this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not be the perhaps ill-informed opinions of the judiciary."). In light of these explicit congressional findings, I find it abundantly clear that Congress was concerned about the "defense of the Constitution" in enacting the ADA.

Overall, viewing the remedial measures in light of the evils presented, both the ADEA and the ADA were valid enactments of Congress to redress discrimination pursuant to its enforcement power under Section 5 of the Fourteenth Amendment. Additionally, because the dangers that the Court found inherent in the RFRA are not

which the Court noted that Congress made no findings concerning widespread unconstitutional discrimination against religious persons to support the RFRA. See *Boerne*, — U.S. — at —, 117 S.Ct. at 2169-70, 138 L.Ed.2d at 645-46; see also *Coolbaugh*, 136 F.3d at 438. The Court, however, went on to state that "[j]udicial deference, in most cases, is based not on the state of the legislative record Congress compiles but 'on due regard for the decision of the body constitutionally appointed to decide.'" *Boerne*, — U.S. at —, 117 S.Ct. at 2170, 138 L.Ed.2d at 646 (quoting *Oregon v. Mitchell*, 400 U.S. 112, 207, 91 S.Ct. 260, 306, 27 L.Ed.2d 272 (1970) (Harlan, J.)).



present in the ADEA and the ADA, I find *Boerne* distinguishable. *Boerne*, — U.S. —, 117 S.Ct. at 2170, 138 L.Ed.2d at 647 (stating that “[t]he reach and scope of [the] RFRA distinguished it from other measures passed under Congress’ enforcement power . . .”). First, the ADEA and the ADA did not pose the same threat as the RFRA to the separation of powers principles, because “Congress included no language attempting to upset the balance of powers and usurp the Court’s function of establishing a standard of review by establishing a standard different from the one previously established by the Supreme Court.” *Coolbaugh*, 136 F.3d at 438.<sup>14</sup> Second, unlike the ADEA and the ADA, the RFRA “prohibit[ed] official actions of almost every description and regardless of subject matter.” *Boerne*, — U.S. at —, 117 S.Ct. at 2170, 138 L.Ed.2d at 646. Neither the ADEA nor the ADA “is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.” *Boerne*, — U.S. at —, 117 S.Ct. at 2170, 138 L.Ed.2d at 646; *see also Coolbaugh*, 136 F.3d at 437 (“Congress’ scheme in the ADA to provide a remedy to the disabled who suffer discrimination and to prevent such discrimination is not so draconian or overly sweeping to be considered disproportionate to the serious threat of discrimination Congress perceived.”); *Clark*, 123 F.3d at 1270. Finally, the standard of review set forth in the RFRA was “the most demanding test known to constitutional law[,]” and imposed an additional requirement on state action that the previous judicial standard that Congress attempted to reinstate, *i.e.*, that the state action be the least restrictive means of fulfilling the state’s interest, had not imposed. *See Boerne*, — U.S. at —, 117 S.Ct. at 2171, 138 L.Ed.2d at 648. The same simply

<sup>14</sup> Although the *Coolbaugh* court was specifically referring to the ADA, I find the same to be true of the ADEA.

cannot be said for analysis of claims under the ADEA and ADA.

In general,

[t]he extension of the ADEA [and the ADA] to the states insures uniformity and greater compliance with [those statutes]. It also eliminates the anomaly that government is not bound by public policy. As Justice Brennan remarked in a related context: “How ‘uniquely amiss’ it would be, therefore, if the government itself—‘the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct’—were permitted to disavow liability for the injury it has be-gotten.”

*Elrod*, 674 F.2d at 612 (quoting *Owen v. City of Independence*, 445 U.S. 622, 651, 100 S.Ct. 1398, 1415, 63 L.Ed.2d 673 (1980)).

### III. CONCLUSION

For the foregoing reasons, I would hold that Congress effectively abrogated the states’ sovereign immunity in enacting the ADEA as well as the ADA. Therefore, I would affirm the district courts’ decisions in *Kimel* and *Dickson*, and would reverse the district court’s decision in *MacPherson*. Accordingly, I concur only in the judgment of Part II of Judge Edmondson’s opinion and otherwise respectfully dissent.



COX, Circuit Judge, concurring in part and dissenting in part:

Congress lacks the constitutional authority to abrogate the states' Eleventh Amendment immunity to suit in federal court on claims under either the Age Discrimination in Employment Act or the Americans with Disabilities Act. For that reason, I concur in Judge Edmondson's conclusion that the states are immune to ADEA suits. I respectfully dissent, however, from the holding that the states do not enjoy the same immunity from ADA suits.

### I. Background

Each of the plaintiffs in these three consolidated appeals sued a state instrumentality, asserting claims under the ADEA or ADA. In each case, the state raised a defense of Eleventh Amendment immunity to suit on such claims. In *MacPherson v. University of Montevallo*, the district court granted the University's motion to dismiss concluding that Congress has not, by enacting the ADEA, abrogated the states' Eleventh Amendment immunity. The district court hearing *Kimel v. Florida Board of Regents*, on the other hand, denied a similar motion by the Florida Board of Regents. And the Florida Department of Corrections likewise unsuccessfully sought dismissal of ADA and ADEA claims against it in *Dickson v. Florida Department of Corrections*.

MacPherson and the state entities in *Dickson* and *Kimel* have appealed the respective rulings. The appeals present two related issues: has Congress abrogated the states' Eleventh Amendment immunity to suits under (1) the ADEA or (2) the ADA? This court's review of such issues of law is de novo. See *Seminole Tribe v. Florida*, 11 F.3d 1016, 1021 (11th Cir.1994), *aff'd*, 517 U.S. 44, 116 S.Ct. 1114, 34 L.Ed.2d 252 (1996).

## II. Discussion

### A. Abrogation

The judicial power of the United States does not extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of that or another state. See U.S. Const. amend. XI; *Hans v. Louisiana*, 134 U.S. 1, 14-15, 10 S.Ct. 504, 507, 33 L.Ed. 842 (1890). Congress may abrogate the states' immunity if first it "unequivocally expresse[s] its intent to abrogate the immunity," and second it acts "pursuant to a valid exercise of power." See *Seminole Tribe v. Florida*, 517 U.S. 44, 54, 116 S.Ct. 1114, 1123, 134 L.Ed.2d 252 (1996) (quoting *Green v. Mansour*, 474 U.S. 64, 68, 106 S.Ct. 423, 426, 88 L.Ed.2d 371 (1985)).

Congress has provided a clear statement of intent to abrogate in the ADA. The Act provides that "[a] State shall not be immune under the eleventh amendment . . . ." 42 U.S.C. § 12202. As Judge Edmondson points out, the ADEA presents a harder question. On one hand, Congress identified state employees as potential plaintiffs and the states as potential defendants. On the other hand, Congress never uses the words "Eleventh Amendment" or "immunity." See [Judge Edmondson's Opinion at 2393-99]. Notwithstanding the omission of these words, the explicit designation of states as potential defendants has led four circuit courts to conclude that Congress did clearly intend to abrogate the states' immunity to ADEA suits. *Hurd v. Pittsburg State Univ.* 109 F.3d 1540, 1544 (10th Cir.1997); *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 695 (3d Cir.1996) (dictum); *Davidson v. Board of Governors of State Colleges & Univs.*, 920 F.2d 441, 443 (7th Cir.1990); *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694, 698 (1st Cir. 1983). The Supreme Court has agreed with this reasoning in other contexts. See *Seminole Tribe*, 517 U.S. at 56, 116 S.Ct. at 1124 (Indian Gaming Act's designation

of states as parties sufficient); *Dellmuth v. Muth*, 491 U.S. 223, 233, 109 S.Ct. 2397, 2403, 105 L.Ed.2d 181 (1989) (Scalia, J., concurring) ("I join the opinion of [four other Justices of] the Court, with the understanding that its reasoning does not preclude congressional elimination of sovereign immunity in statutory text that clearly subjects States to suit for monetary damages, though without explicit references to state sovereign immunity or the Eleventh Amendment."); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452, 96 S.Ct. 2666, 2670, 49 L.Ed.2d 614 (1976) (Title VII's designation of states as parties enough).

Fortunately, the thorny issue of Congress's intent need not be resolved here. Whether or not, Congress clearly expressed its intent, it lacks the power to abrogate the states' immunity to suit in federal court in actions under the ADEA or the ADA. The Supreme Court has identified only one constitutional grant of power, § 5 of the Fourteenth Amendment, under which Congress may defeat the states' immunity. See *Seminole Tribe*, 517 U.S. at 58-59, 116 S.Ct. at 1125-28. The Court has recently revisited the limits on that power.

#### B. Power to Abrogate: *City of Boerne v. Flores*

In *City of Boerne v. Flores*, — U.S. —, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), the Court struck down the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb to 2000bb-4. The RFRA prohibited all governmental entities from "substantially burdening" the exercises of religion unless they had a compelling interest for doing so and had employed the "least restrictive means" for furthering that interest. *Id.* § 2000bb-1(a), (b). With the RFRA's stringent rule, Congress sought to resurrect the First and Fourteenth Amendment rights that Congress believed the Supreme Court had ex-

tinguished in *Employment Division v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). A Roman Catholic church in Boerne, Texas, invoked the Act when the town denied the church a permit to add additional worship space. *Boerne*, — U.S. at —, 117 S.Ct. at 2160. The district court held that the RFRA was beyond Congress's Fourteenth Amendment powers, and the Supreme Court agreed.

The Court rested this conclusion on a basic principle: The Court is the unique, ultimate authority on the scope of Fourteenth Amendment rights. See *id.* at —, 117 S.Ct. at 2166. Thus, Congress may not define or declare these rights. See *id.* Rather, Congress may only enforce the Fourteenth Amendment rights the Supreme Court has recognized. See *id.* at —, 117 S.Ct. at 2164. Enforcement can include creating some rights beyond those clearly guaranteed by the Constitution. See *id.* at —, 117 S.Ct. at 2163. But, the Court concluded, such extensions of rights must be proportional to an unconstitutional injury that Congress is seeking to remedy. See *id.* at —, 117 S.Ct. at 2164.

The RFRA was not such a proportional response to any injury to constitutional rights. The Court identified two circumstances that showed the RFRA to be "substantive" legislation, as the Court called it, rather than enforcement of Fourteenth Amendment guarantees. First, Congress enacted the RFRA without findings (or even hearings) on the existence of widespread violations of any constitutional right that the Supreme Court has recognized. *Id.* at —, 117 S.Ct. at 2169. Second, rather than simply remedying any constitutional violations, the RFRA created rights that far exceeded any the Supreme Court has read the First Amendment to provide. See *id.* at —, 117 S.Ct. at 2170. Under *Smith*, generally applicable statutes that incidentally burden religion are permissible, see 494 U.S. at 878-79, 110 S. Ct. at 1600; the



RFRA could not be enforcing any First and Fourteenth Amendment right to be free from incidental burdens on religious practice. See *Boerne*, — U.S. at —, 117 S.Ct. at 2171. Therefore, Congress did not have power under the Fourteenth Amendment to enact the statute.

*Boerne* thus sets the RFRA outside § 5's boundary. Two earlier cases, both concerning the Voting Rights Act of 1965, exemplify proper exercise of Congress's § 5 power. The first case is *South Carolina v. Katzenbach*, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966), which rejected a broad attack on most of the geographically restricted provisions of the Voting Rights Act. The second is *Katzenbach v. Morgan*, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966), which upheld a provision of the Act that invalidated New York's English-literacy voter-qualification rule. Of the two cases, *Morgan* appears to attribute the broadest powers to Congress, arguably recognizing a congressional power not only to effectuate Supreme Court-identified rights but also to find Fourteenth Amendment rights not yet identified by the Supreme Court. See *Morgan*, 384 U.S. at 650-51, 86 S.Ct. at 1723-24.

The *Boerne* Court dismissed the language in *Morgan* that suggests that Congress has broad powers both to interpret the Fourteenth Amendment and effectuate Fourteenth Amendment rights, *Boerne*, — U.S. at —, 117 S.Ct. at 2168, but the Court reaffirmed its holdings in these Voting Rights Act cases. *Id.* at — - —, 117 S.Ct. at 2166-68. The differences between the circumstances underlying the Voting Rights Act and those leading to the RFRA are, after all, striking. Before passing the Voting Rights Act, Congress thoroughly documented a history of obvious Fifteenth Amendment violations, and the legislative history indicates that the Act's primary purpose was to vindicate the Fifteenth Amendment rights that Southern voting laws and practices were defeating.

*Morgan*, 384 U.S. at 648, 86 S.Ct. at 1722; *South Carolina*, 383 U.S. at 313, 328, 86 S.Ct. at 811, 818-19. Congress took measures tailored to remedy the constitutional violations: the measures were limited to prohibiting patently unconstitutional conduct and establishing policing mechanisms for future violations; they applied only to states where Congress found constitutional violations were the most common; and the Act contained "bailout" provisions to relieve jurisdictions that complied with the Constitution from the Act's restraints. See *Boerne*, — U.S. at —, 117 S.Ct. at 2170. The Voting Rights Act effectuated established constitutional guarantees.

*Boerne* and the Voting Rights Act cases teach us these lessons: Only by respecting Supreme Court interpretations of the Fourteenth Amendment can Congress avoid impermissibly interpreting the Amendment itself. See *Boerne*, — U.S. at — - —, 117 S.Ct. at 2166-67. Congress nonetheless may, if circumstances warrant, tweak procedures, find certain facts to be presumptively true, and deem certain conduct presumptively unconstitutional in light of Supreme Court interpretation. See *South Carolina*, 383 U.S. at 328, 333, 335, 86 S.Ct. at 818, 821-22. Thus, legislation enacted pursuant to § 5 must hew to the contours of Supreme Court-defined Fourteenth Amendment rights unless the legislation is a proportional response to a documented pattern of constitutional violation.

### C. Is the ADEA Enforcement Legislation?

The ADEA does not qualify under *Boerne*'s rule as a proper exercise of Congress's § 5 power.<sup>1</sup> First, the ADEA

<sup>1</sup> There is pre-*Boerne* law in other circuits finding the exercise to be proper. See *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694, 699 (1st Cir.1983); *E.E.O.C. v. Elrod*, 674 F.2d 601, 605 (7th Cir.1982); *Arritt v. Grisell*, 567 F.2d 1267, 1271 (4th Cir.1977). They share a similar analysis, which has two flaws. First, it rests on broad language in *Katzenbach v. Morgan*, 384 U.S. at 650-51, 86 S.Ct. at 1723-24, that *Boerne* has since rejected, — U.S. at —, 117 S.Ct. at



confers rights far more extensive than those the Fourteenth Amendment provides. Second, Congress did not enact the ADEA as a proportional response to any widespread violation of the elderly's constitutional rights.

The Fourteenth Amendment right that the ADEA arguably guards is that of equal protection. The Equal Protection Clause generally prohibits states from treating similarly situated citizen differently. See *Romer v. Evans*, 517 U.S. 620, 621, 116 S.Ct. 1620, 1623, 134 L.Ed.2d 855 (1996). But the degree of protection varies according to the class of person discriminated against or the interest that the classification compromises. See *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440-42, 105 S.Ct. 3249, 3254-55, 87 L.Ed.2d 313 (1985). State action that confers different rights, or imposes different duties, on persons belonging to non-suspect classes is permissible if the action has a rational relation to a legitimate governmental interest. See *Romer*, 517 U.S. at 630, 116 S.Ct. at 1627.

The elderly are not a suspect class, and state action that disadvantages them is constitutional if it passes this rational basis test. See *Gregory v. Ashcroft*, 501 U.S. 452, 470, 111 S.Ct. 2395, 2406, 115 L.Ed.2d 410 (1991); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313-14, 96 S.Ct. 2562, 2567, 49 L.Ed.2d 520 (1976). Under this test, the Supreme Court will not overturn a state measure "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [people's] actions were irrational." *Gregory*, 501 U.S. at 471, 111 S.Ct. at 2406 (quoting *Vance v. Bradley*, 440 U.S. 93, 97, 99 S.Ct. 939, 942-43, 59

2168. Second, it treats all "discrimination" as equally impermissible under the Equal Protection Clause and therefore within Congress's power to remedy. That is simply not true. Race and age discrimination, for example, are subject to very different degrees of scrutiny.

L.Ed.2d 171 (1979)) (alterations in original). And a state does not violate the Equal Protection Clause "merely because the classifications made by the law are imperfect." *Id.* at 473, 111 S.Ct. at 2407 (quoting *Murgia*, 427 U.S. at 316, 96 S.Ct. at 2568). Moreover, "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance*, 440 U.S. at 111, 99 S.Ct. at 949.

The Supreme Court has put three mandatory retirement age policies to this test, and all have passed. *Gregory*, 501 U.S. at 452, 111 S.Ct. at 2395 (policy required judges to retire at 70); *Vance*, 440 U.S. at 93, 99 S.Ct. at 939 (policy required foreign service officers to retire at 60); *Murgia*, 427 U.S. at 307, 96 S.Ct. at 2562 (policy required police officers to retire at 50). In each case, the policymaker's perception that mental acuity and physical stamina decline with age was rational basis enough to support the line between those under the retirement age and those over it. *Gregory*, 501 U.S. at 472, 111 S.Ct. at 2407; *Vance*, 440 U.S. at 98-109, 99 S.Ct. at 943-49; *Murgia*, 427 U.S. at 315-16, 96 S.Ct. at 2567-68. Thus, it is clear that the Supreme Court does not deem *all* arbitrary treatment offensive to the Fourteenth Amendment. To a spry octogenarian, of course, a mandatory retirement age is arbitrary; it does not permit an assessment of his or her individual capacities. To violate the Equal Protection Clause, however, the *arbitrary line itself* must have no rational basis. See *Gregory*, 501 U.S. at 472, 111 S.Ct. at 2407. In short, the Equal Protection Clause permits state action—if it has a rational basis—that may look like arbitrariness.

By contrast, the ADEA was enacted to combat *all* arbitrariness, unconstitutional or not. Its legislative history shows that Congress particularly deplored, and wished to ban, arbitrary age limits that overlooked some individuals'

abilities. See *E.E.O.C. v. Wyoming*, 460 U.S. 226, 231, 103 S.Ct. 1054, 1057-58, 75 L.Ed.2d 18 (1983); see also 29 U.S.C. § 621(a)(2) (statement of findings and purpose) ("the setting of arbitrary age limits regardless of potential for job performance has become a common practice"). Not surprisingly, the Supreme Court has read the ADEA to prohibit arbitrary line-drawing—even line-drawing that has a rational basis. "It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 113 S.Ct. 1701, 1706, 123 L.Ed.2d 338 (1993). "Thus the ADEA commands that 'employers are to evaluate [older] employees . . . on their merits and not their age.' . . . The employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly." *Id.* at 611, 113 S.Ct. at 1706 (quoting *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 422, 105 S.Ct. 2743, 2756, 86 L.Ed.2d 321 (1985)).

The ADEA accordingly puts mandatory retirement ages to a much more rigorous test than the Equal Protection Clause. A rational basis does not suffice. *Criswell*, 472 U.S. at 421, 105 S.Ct. at 2755. Rather, "[u]nless an employer can establish a substantial basis for believing that all or nearly all employees above an age lack the qualifications required for the position, the age selected for mandatory retirement less than 70 must be an age at which it is highly impractical for the employer to [e]nsure by individual testing that its employees will have the necessary qualifications for the job." *Id.* at 422-23, 105 S.Ct. at 2756; see also *Arritt v. Grisell*, 567 F.2d 1267, 1271 (4th Cir.1977) (finding a mandatory maximum hiring age violative of ADEA, but not of the Equal Protection Clause).

Mandatory age limits are not the only illustration of the gulf between the elderly's rights under the Equal Pro-

tection Clause and the elderly's rights under the ADEA. State action that has a disparate impact on old workers probably does not violate the Equal Protection Clause, but it can violate the ADEA. Compare *Washington v. Davis*, 426 U.S. 229, 239-40, 96 S.Ct. 2040, 2047-48, 48 L.Ed.2d 597 (1976) (rejecting a disparate-impact theory of violation of the Equal Protection Clause even for suspect classifications), with *MacPherson v. University of Montevallo*, 922 F.2d 766, 770-73 (11th Cir. 1991) (recognizing a disparate-impact claim theory under the ADEA). Some courts have held that the ADEA so far overshadows equal protection rights that the ADEA has completely displaced 18 U.S.C. § 1983 as a vehicle for an age discrimination claim. See *Lafleur v. Texas Dep't of Health*, 126 F.3d 758, 760 (5th Cir.1997); *Zombro v. Baltimore City Police Dep't*, 868 F.2d 1364, 1366-67 (4th Cir.1989). Even where such a § 1983 claim is recognized, the Fourteenth Amendment has been held to permit demotion of a worker for the proffered rational reason that new, young, and attractive faces were needed in her stead—practically a paradigmatic ADEA violation. See *Izquierdo Prieto v. Mercado Rosa*, 894 F.2d 467, 469, 472 (1st Cir.1990). And one court has gone so far as to question the existence of any constitutional right against age-motivated individual employment actions. See *Whitacre v. Davey*, 890 F.2d 1168, 1169 n. 3 (D.C.Cir.1989).

As one might expect after considering these differences, Congress's reasons for amending the ADEA to subject states to its restraints did not lie in concern for the Constitution. The reports accompanying the 1974 amendments do not mention the Constitution at all. See H.R. Rep. No. 93-913 (1974), reprinted in 1974 U.S.C.C.A.N. 2811, 2849-50. Congressional debate over the amendments, which were included in the Fair Labor Standards Act of 1974, was silent on constitutional violations. See 120 Cong. Rec. 7306-49, 8759-69 (1974). The supporters simply thought it was a good idea, not that it furthered enforcement of constitutional rights. See 1974 U.S.C.C.A.N.



at 2849 ("Discrimination based on age—what some people call 'age-ism'—can be as great an evil in our society as discrimination based on race or religion or any other characteristic which ignores a person's unique status as an individual and treats him or her as a member of some arbitrarily-defined group.") (quoting Richard M. Nixon Address (March 23, 1972)).

In sum, the ADEA has created a new class of rights, but not in response to any threat to constitutional rights. The ADEA thus fails *Boerne's* standard for enforcement legislation. Because the ADEA is not a valid exercise of Congress's § 5 authority, Congress could not have abrogated the states' Eleventh Amendment immunity to suit.

#### D. Is the ADA Enforcement Legislation?

The ADA is not a valid enforcement statute for the same two reasons the ADEA is not. First, like the aged, the disabled enjoy no special rights under the Equal Protection Clause.<sup>2</sup> The Supreme Court has never found the disabled to be a suspect or even quasi-suspect class. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 445-46, 105 S.Ct. 3249, 3257, 87 L.Ed.2d 313 (1985) (declining to "set out on [the] course" leading to quasi-suspect status for the disabled and infirm); *see*

<sup>2</sup> Here I respectfully part company with Chief Judge Hatchett and the Ninth, Eighth, and Fifth Circuits. I agree in general with those circuits' analyses of the scope of Congress's § 5 power. *See Autio v. AFSCME, Local 3139*, — F.3d —, No. 97-3145 (8th Cir. Apr. 9, 1998); *Coolbaugh v. Louisiana*, 136 F.3d 430, 432 (5th Cir. 1998); *Clark v. California*, 123 F.3d 1267, 1270 (9th Cir.), *pet. for cert. filed*, 66 U.S.L.W. 3308 (1997). The *Clark* court concludes that the ADA lies within Congress's enforcement power because the Constitution prohibits discrimination against disabled people. *See id.* This reasoning does not go far enough; it matters *what kind* of discrimination the Constitution prohibits, and whether the ADA was aimed at that kind of discrimination. The *Coolbaugh* and *Autio* courts make essentially the same mistake. *See Coolbaugh*, 136 F.3d at 441 (Smith, J., dissenting).

*also Heller v. Doe by Doe*, 509 U.S. 312, 321, 113 S.Ct. 2637, 2643, 125 L.Ed.2d 257 (1993) (confirming this position). State action discriminating against the mentally retarded, a subset of the disabled, is subject to only rational basis review. *City of Cleburne*, 473 U.S. at 446, 105 S.Ct. at 3258. The lower court have interpreted these holdings to require only rational basis review for all discrimination against the disabled. *See, e.g., Lussier v. Dugger*, 904 F.2d 661, 670-71 (11th Cir. 1990). And this review is not searching: "courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Heller*, 509 U.S. at 321, 113 S.Ct. at 2643.

By contrast, the ADA prohibits distinctions built on generalizations—even if rational. It prohibits discrimination for practically any reason that does not reflect a business necessity. *See* 42 U.S.C. § 12112(a); *see also Pritchard v. Southern Co. Services*, 92 F.3d 1130, 1132 (11th Cir.) (listing elements of prima facie ADA claim), *amended on reh'g in other part*, 102 F.3d 1118 (11th Cir. 1996), *cert. denied*, — U.S. —, 117 S.Ct. 2453, 138 L.Ed.2d 211 (1997). It requires assessment of each employee's abilities and reasonable accommodation to the point of undue hardship. *See* 42 U.S.C. § 12111(8) (defining "qualified individual with a disability" as one who can perform essential functions of job with reasonable accommodation); *id.* § 12112(b)(5)(A) (defining discrimination as failure to make reasonable accommodations, unless accommodation would create undue hardship for the employer); H.R. Rep. No. 101-485, at 58, *reprinted in* 1990 U.S.C.C.A.N. 303, 340 ("[C]overed entities are required to make employment decisions based on facts applicable to individual applicants or employees, and not on the basis of presumptions as to what a class of individuals with disabilities can or cannot do."). Thus, the ADA provides much greater protection for the disabled than does the Equal Protection Clause.



The second reason the ADA is not enforcement legislation is that it was unaccompanied by any finding that widespread violation of the disabled's constitutional rights required the creation of prophylactic remedies. In the legislative history, Congress did not even mention that the ADA was meant to remedy Fourteenth Amendment violations. The committee reports that accompany the Act emphasize the discouraging effect of employment discrimination on the disabled and the costs to society of caring for those who could care for themselves, absent discrimination. *See, e.g.*, H.R.Rep. No. 101-485, at 41-47, reprinted in 1990 U.S.C.C.A.N. 303, 323-29. Far from implying that the state of affairs resulted from violations of any constitutional rights, the legislative history and the Act itself show that Congress was dismayed by the lack of rights the disabled enjoyed before the Act's passage. *See* 42 U.S.C. § 12101(a)(4) ("[I]ndividuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination[.]"); *see, e.g., id.* at 47-48, 1990 U.S.C.C.A.N. at 329-30. Altruistic and economic concerns motivated this Act—not defense of the Constitution. The laudability of Congress's goals provides no exception to the limits on Congress's Fourteenth Amendment power.

Like the ADEA, the ADA was not enforcement legislation under *Boerne's* rule. Congress therefore could not abrogate the states' immunity.

### III. Conclusion

For the foregoing reasons, I would: affirm the dismissal in *MacPherson*; and reverse the denials of the motions to dismiss in *Kimel* and *Dickson*, and remand with instructions to dismiss for want of jurisdiction.

### APPENDIX B

#### IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

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Case No. TCA 95-40194-MMP

J. DANIEL KIMEL, JR., *et al.*,  
Plaintiffs,

v.

FLORIDA BOARD OF REGENTS,  
Defendant.

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### ORDER

This cause comes before the Court on the following pending motions:

- (1) Maxine Stern's motion for substitution (Doc. 84)—to which Defendant has responded (Doc. 94); and
- (2) Defendant's motion to dismiss (Doc. 86)—to which Plaintiffs have responded (Doc. 96).

Each of these motions is addressed below.

### DISCUSSION:

#### I. Maxine Stern's Motion For Substitution (Doc. 84):

Maxine Stern, the wife of Plaintiff Jerome Stern, has filed a statement of fact of death of Jerome Stern (Doc. 85). Mrs. Stern represents that there will be no administration of her husband's estate, since she jointly held all property with her husband. Mrs. Stern therefore moves

for substitution as a party-plaintiff in this action (Doc. 84), pursuant to Federal Rule of Civil Procedure 25(a).

Defendant objects on the ground that Mrs. Stern seeks substitution solely in her capacity as Jerome Stern's surviving widow. According to Defendant, spousal capacity alone is insufficient to permit substitution; instead, Defendant contends that the personal representative of Mr. Stern's estate is the appropriate person to substitute. Defendant further states that because Mr. Stern had a will and lineal descendants, Mrs. Stern should not be substituted until such time as she is appointed the administrator of Mr. Stern's estate. Defendant relies on *Marcano v. Offshore Venezuela*, 497 F. Supp. 204 (E.D. La. 1980), to support its conclusion that Mrs. Stern's motion should be denied.

Federal Rule of Civil Procedure 25 controls the substitution of parties, and provides that a motion under the rule "... may be made by any party or by the successors or representatives of the deceased party . . . ." Fed. R. Civ. P. 25(a). Courts interpreting this rule have held that "the surviving spouse must either notify the Court that the estate has been distributed without being filed for probate, or she must become appointed executrix of decedent's estate." *Hanover Ins. Co. v. White Kitchen Square, Ltd.*, No. 93-1826, 1994 WL 151094, at \*1 (E.D. La. 1994) (emphasis added). *Accord McCurely v. McClellan*, 753 F.2d 88, 98-99 (D.C. Cir.), cert. denied, 474 U.S. 1005, 106 S. Ct. 525, 88 L. Ed. 2d 457 (1985); *Hardy v. Kaszycki & Sons Contractors, Inc.*, 842 F. Supp. 713, 716 (S.D.N.Y. 1993); *Gronowicz v. Leonard*, 109 F.R.D. 624, 626 (S.D.N.Y. 1986). Cf. *Kilgo v. Bowman Transp., Inc.*, 87 F.R.D. 26, 27 (N.D. Ga. 1980) (individual named as executor in decedent plaintiff's will who elected statutory share rather than probating will and becoming executor of decedent's estate, was substitutable as a "proper party.").

In the case sub judice, although Mr. Stern had a will, Mrs. Stern has duly notified the Court that (1) there will be no administration of Mr. Stern's estate, and (2) she jointly held all Mr. Stern's property with him. Under the authority of the foregoing line of cases, Mrs. Stern is clearly a distributee of an unprobated estate, and is accordingly entitled to be substituted in the stead of her deceased husband. Motion for substitution (Doc. 84) is GRANTED.

## II. Defendant's Motion To Dismiss (Doc. 86):

Defendant has moved to dismiss Plaintiffs' claims against it under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, predicated on the grounds of Eleventh Amendment immunity (Doc. 86). Defendant maintains that Congress did not abrogate the states' rights to Eleventh Amendment Immunity when it passed the ADEA, arguing that (1) Congress did not include express language in the Act that it was revoking such immunity, and (2) Congress did not adopt the Act pursuant to a valid exercise of power under the Fourteenth Amendment. Defendant instead contends that the Act was passed pursuant to Congress' exercise of its expansive Commerce Clause powers, citing a litany of legislative history and case law, including statutory construction under *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 101 S. Ct. 1531, 67 L. Ed. 2d 694 (1981). Defendant concludes by asserting that since the State of Florida has not consented to being sued, the Eleventh Amendment provides an absolute bar to this suit.

The Eleventh Amendment is an absolute bar to a suit for damages by an individual against a state or its agencies in federal court. *Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974). This bar applies to suits by the citizens of a state against their own state. *Gamble v. HRS*, 779 F.2d 1509, 1511 (11th Cir.



1986). The Eleventh Amendment bar, however, can be lifted in two ways. First, Congress may abrogate the states' immunity via its powers under § 5 of the Fourteenth Amendment. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S. Ct. 2666, 49 L. Ed. 2d 614 (1976). Second, a state may waive its Eleventh Amendment immunity and consent to suit in federal court. *Edelman*, 415 U.S. at 673, 94 S. Ct. at 1360-61. An examination of relevant case law demonstrates that Congress has expressly abrogated the state's Eleventh Amendment immunity to ADEA claims pursuant to its authority under § 5 of the Fourteenth Amendment.

As an initial matter, Defendant is simply wrong in implying that the absence of express language in the ADEA that Congress was abrogating the states' Eleventh Amendment immunity somehow shows that Congress did not intend to revoke such immunity. In fact, Congress expressed its intention to abrogate the states' immunity by including in the ADEA's definition of "employer" a "State and any . . . agency or instrumentality of a State . . ." See 29 U.S.C. § 626(b). Circuit courts that have considered this issue have reached similar conclusions. See, e.g., *Hurd v. Pittsburgh State Univ.*, 29 F.3d 564, 564-65 (10th Cir.), cert. denied, 115 S. Ct. 321, 130 L. Ed. 2d 282 (1994); *Bell v. Purdue Univ.*, 975 F.2d 422, 425 n.5 (7th Cir. 1992); *Santiago v. New York State Dep't of Correctional Servs.*, 945 F.2d 25, 31 (2d Cir. 1991), cert. denied, 502 U.S. 1094, 112 S. Ct. 1168, 117 L. Ed. 2d 414 (1992); *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694, 700-01 (1st Cir. 1983).

Defendant's second argument, that the ADEA was passed pursuant to Congress' Commerce Clause power and not the Fourteenth Amendment, is also without merit<sup>1</sup>. While the Supreme Court has held that the

<sup>1</sup> Defendant makes this argument in an attempt to show that Congress lacked the power to abrogate the states' Eleventh Amendment immunity to ADEA claims. According to Defendant, the

ADEA was a valid exercise of Congress' powers under the Commerce Clause, the Court also declined to decide whether the ADEA could also be upheld under § 5 of the Fourteenth Amendment. *EEOC v. Wyoming*, 460 U.S. 226, 243, 103 S. Ct. 1054, 1064, 75 L. Ed. 2d 18 (1983). Nevertheless, the majority of circuit courts that have addressed the issue have concluded that the ADEA was also a proper exercise of Congressional authority under the Fourteenth Amendment. See, e.g., *Ramirez*, 715 F.2d at 697-700; *Arritt v. Grisell*, 567 F.2d 1267, 1271 (4th Cir. 1977); *Davidson v. Board of Governors*, 920 F.2d 441, 443 (7th Cir. 1990); *EEOC v. Wyoming Retirement Sys.*, 771 F.2d 1425, 1428 & n.1 (10th Cir. 1985). District courts within the Eleventh Circuit have reached similar conclusions. See, e.g., *Griswold v. Alabama Dep't Indus. Relations*, 903 F. Supp. 1492, 1496 (M.D. Ala. 1995); *Brogdon v. Alabama Dept' of Econ. & Comm. Aff.*, 864 F. Supp. 1161, 1165 (M.D. Ala. 1994).

Consequently, Defendant's motion to dismiss on the basis of Eleventh Amendment immunity (Doc. 86) is DENIED.

Accordingly, it is hereby

ORDERED AND ADJUDGED:

1. Maxine Stern's motion for substitution (Doc. 84) is GRANTED. The clerk is directed to substitute Maxine Stern as a party-plaintiff for her deceased husband, Jerome Stern.

2. Defendant's motion to dismiss (Doc. 86) is DENIED.

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Supreme Court's recent narrowing of congressional Commerce Clause power [see *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996)] precludes Congress from revoking such immunity under its Commerce Clause powers.



56a

DONE AND ORDERED this 17th day of May, 1996.

/s/ Maurice M. Paul  
MAURICE M. PAUL  
Chief Judge

57a

APPENDIX C

[Filed Nov. 9, 1996]

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF FLORIDA  
PANAMA CITY DIVISION

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Case No. 5:96cv207-RH

WELLINGTON N. DICKSON,  
*Plaintiff,*

v.

FLORIDA DEPARTMENT OF  
CORRECTIONS ETC., *et al.,*  
*Defendants.*

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ORDER ON DEFENDANTS' MOTION TO DISMISS

In this action plaintiff Wellington N. Dickson alleges that his employer, the Florida Department of Corrections, failed to promote him and took other adverse employment action against him in violation of the Age Discrimination in Employment Act ("ADEA") and Americans with Disabilities Act ("ADA").

Mr. Dickson originally named two entities and two individuals as defendants. By order dated October 1, 1996, I dismissed all claims against the individuals, leaving only the two entities as defendants. They also have moved to dismiss.

Their motion raises three issues that warrant discussion: whether Mr. Dickson has named a proper defendant; whether Mr. Dickson's claims are barred by the

Eleventh Amendment; and whether Mr. Dickson has stated a claim for punitive damages under 42 U.S.C. § 1981a. I reject the remaining grounds of the motion to dismiss without discussion.

### *The Proper Defendant*

The two remaining defendants, as described in the complaint, are "Florida Department of Corrections, Jackson County" and "Jackson Correctional Institution."

Jackson Correctional Institution has no independent corporate existence. It is, instead, simply part of the state correctional system operated by the Department of Corrections. See § 944.02(1), Fla. Stat. (1995). The Department of Corrections has supervisory and protective care, custody and control over all matters pertaining to all prisons and other state correctional institutions, including Jackson Correctional Institution. See § 945.025, Fla. Stat. (1995). Accordingly, Jackson Correctional Institution is not a suable entity, and all claims purportedly against Jackson Correctional Institution will be dismissed.

The Department of Corrections is a suable entity. See, e.g., *Pan-Am Tobacco Corp. v. Department of Corrections*, 471 So. 2d 4 (Fla. 1984). I construe the complaint's reference to the "Florida Department of Corrections, Jackson County" as a reference to the Florida Department of Corrections. As so construed, the complaint names a proper defendant. The action will continue solely as against the Department of Corrections.

### *The Eleventh Amendment*

The Department of Corrections contends that the Eleventh Amendment bars Mr. Dickson's ADA and ADEA claims. Mr. Dickson responds that Congress abrogated the states' immunity in both the ADA and the ADEA.

In determining whether Congress has abrogated the states' Eleventh Amendment immunity, two questions must be addressed: first, whether Congress has unequivocally

expressed its intent to abrogate the immunity, and second, whether Congress had authority to do so. *Green v. Mansour*, 474 U.S. 64, 68, 106 S.Ct. 423, 425-68, 88 L.Ed.2d 371 (1985). It is undisputed that Congress expressed its intent to abrogate the states' immunity under the ADA, 42 U.S.C. § 12202, and under the ADEA, 29 U.S.C. § 630(b). Whether Congress had authority to do so is somewhat more problematic.

In *Seminole Tribe v. Florida*, — U.S. —, 116 S.Ct. 1114, — L.Ed.2d — (1996), the United States Supreme Court overruled *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989), and concluded that Congress, by statute, may not override the Eleventh Amendment except under authority of section 5 of the Fourteenth Amendment. The critical question here therefore is whether Congress had authority under section 5 to enact the ADA and ADEA.

While the Eleventh Circuit has not addressed this question, the great weight of authority holds that Congress did have such authority under section 5. See, e.g., *Hurd v. Pittsburgh State University*, 29 F.3d 564 (10th Cir. 1994) (ADEA), cert. denied, — U.S. —, 115 S.Ct. 321, 130 L.Ed.2d 282 (1994); *Heiar v. Crawford County*, 746 F.2d 1190 (7th Cir. 1984) (ADEA), cert. denied, 472 U.S. 1027, 105 S.Ct. 3500, 87 L.Ed.2d 631 (1985); *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694 (1st Cir. 1983) (ADEA); *EEOC v. Elrod*, 674 F.2d 601 (7th Cir. 1982) (ADEA); *Mayer v. University of Minnesota*, No. CIV. 4-95-444, 1996 WL 599234 (D. Minn. Oct. 15, 1996) (ADA); *Niece v. Fitzner*, No. 94-CV-70718-DT, 1996 WL 588217 (E.D. Mich. Oct. 10, 1996) (ADA); *Armstrong v. Wilson*, No. C 94-2307 CW, 1996 WL 580847 (N.D. Cal. Sept. 20, 1996) (ADA); *Griswold v. Alabama Dep't of Indus. Relations*, 903 F. Supp. 1492 (M.D. Ala. 1995) (ADEA). But see *MacPherson v. University of Montevallo*, No. 94-AR-2962-S, 1996 WL 521201 (N.D. Ala. Sept. 9, 1996)

(agreeing with the dissenters in *EEOC v. Wyoming*, 460 U.S. 226, 235-44, 103 S.Ct. 1054, 1059-64, 75 L.Ed.2d 18 (1983), that "the ADEA was enacted pursuant to the Commerce Clause and not the Fourteenth Amendment").

Like the majority of courts that have addressed the issue, I conclude that Congress had authority under section 5 of the Fourteenth Amendment to enact the ADEA and ADA. Accordingly, the Eleventh Amendment does not bar Mr. Dickson's ADEA and ADA claims.

#### *Punitive Damages*

Finally, the Department correctly asserts that Mr. Dickson cannot recover punitive damages under 42 U.S.C. § 1981a. Section 1981a(b)(1) provides: "A complaining party may recover punitive damages under this section against a respondent (*other than a government, government agency or political subdivision*) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." (Emphasis added). The language plainly excludes Mr. Dickson's claims against the Department.

Accordingly,

#### **IT IS ORDERED:**

Defendants' motion to dismiss (document 18) is **GRANTED IN PART** and **DENIED IN PART**. Plaintiff's claims for punitive damages are dismissed as are all claims against Jackson Correctional Institution. The motion to dismiss is denied in all other respects.

SO ORDERED this 5th day of November, 1996.

/s/ Robert L. Hinkle  
ROBERT L. HINKLE  
United States District Judge

#### **APPENDIX D**

[Filed Sep. 9, 1996]

#### **UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION**

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Civil Action No. 94-AR-2962-S

RODERICK MACPHERSON, *et al.*,  
Plaintiff,

vs.

UNIVERSITY OF MONTEVALLO,  
Defendant.

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#### **MEMORANDUM OPINION**

Now before the court is a motion to dismiss filed in the above-styled action by defendant, University of Montevallo, on July 25, 1996. The motion was filed pursuant to Rule 12(b)(1), Fed. R. Civ. P. Plaintiffs, Roderick MacPherson and Marvin Narz, allege that defendant has violated the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.* ("ADEA"), as well as, plaintiffs' right to freedom of speech guaranteed by the First Amendment.<sup>1</sup> Plaintiffs consent to the dismissal of their First Amendment claims. Accordingly, the only issue in contention for this motion to dismiss is whether the University of Montevallo, as an instrumentality of the State of Alabama,<sup>2</sup> is entitled to Eleventh Amendment immunity. Because defendant has demonstrated that it is entitled to Eleventh Amendment immu-

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<sup>1</sup> See Plaintiffs' brief at 2.

<sup>2</sup> See Ala. Code 1975, §§ 16-54-1 through 16-54-18.



nity, this court lacks subject matter jurisdiction over the ADEA claim, and defendant's motion to dismiss is due to be granted.

### FACTS

Plaintiffs, MacPherson and Narz, allege that they are employed by defendant as associate professors and have been subjected to discrimination based upon their age. MacPherson and Narz aver that they are 49 and 50 years old respectively. Plaintiffs allege that defendant has engaged in a pattern and practice of discrimination against them and a continuing practice of treating younger faculty members more favorably than older faculty members with regard to salaries and promotions. Furthermore, plaintiffs aver that defendant has used an age-based evaluation system to discriminate against plaintiffs with regard to promotions, assignments, benefits and salaries.

Plaintiffs further allege that defendant has retaliated against them based upon previous EEOC charges and a previous lawsuit against same defendant for age discrimination, CV 88-B-1341-S. Plaintiffs allege that the previous lawsuit was settled and is subject to a confidentiality agreement. Plaintiffs claim that defendant has engaged in a continuing practice of discrimination and retaliation against them.

### ANALYSIS

In Count I, MacPherson and Narz allege that the University of Montevallo discriminated against them in violation of the antidiscrimination provisions of the ADEA. MacPherson and Narz are clearly within the class of persons protected by the ADEA. See 29 U.S.C. § 631(a) (1996). Because the relevant section of the ADEA makes it illegal "for an employer to . . . discriminate against any individual . . . because of such individual's age," 29 U.S.C. § 623(a)(1), MacPherson and Narz have the statutory foundation for an ADEA claim.<sup>3</sup> As

<sup>3</sup> The term "employer" includes "a State . . . or any agency or instrumentality of a State . . ." 29 U.S.C. § 630(b)(2) (1996).

a result, the court must determine whether the Eleventh Amendment immunizes defendant from plaintiffs' ADEA claims.<sup>4</sup>

When determining if the Eleventh Amendment immunizes a particular governmental entity from suit in federal court, the court must proceed through a multi-tiered analysis. First, the court must determine if the governmental entity is the alter-ego of or an arm of the state and therefore entitled to Eleventh Amendment immunity. See, e.g., *Harden v. Adams*, 760 F.2d 1158 (11th Cir.), cert. denied sub nom. *Grimmer v. Harden*, 474 U.S. 1007, 106 S. Ct. 530 (1985). Even if the court determines that the entity falls within the purview of the Eleventh Amendment, the states' immunity is not absolute. Next, the court must apply the second and third steps to determine if the state entity has waived its Eleventh Amendment immunity and/or whether Congress has lawfully abrogated the states' collective Eleventh Amendment immunity. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 95 S. Ct. 2666 (1976). If Eleventh Amendment immunity is not waived or expressly abrogated, then the Eleventh Amendment serves as a jurisdictional bar to suit. See *Pennhurst State School & Hosp. v. Halderman*, 465 U.C. 89, 104 S. Ct. 900 (1984).

In the instant action, neither side disputes that the University of Montevallo is an instrumentality of the state. In fact, the issue of whether Universities of the state of Alabama are instrumentalities of the state has already been litigated and decided. See *Harden*, 760 F.2d

<sup>4</sup> The scope of the Eleventh Amendment to the United States Constitution is textually limited: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend XI. However, the facial reading of the Amendment has been rejected by the Supreme Court. See *Hans v. Louisiana*, 134 U.S. 1, 10 S. Ct. 504 (1890). As a result, the States' sovereign immunity in Federal Court is vast.

at 1163-1164 (stating that the Alabama Supreme Court has held that Alabama universities are instrumentalities or agencies of the state). Accordingly, the University of Montevallo is entitled to whatever protection the Eleventh Amendment provides.

Next, the court must turn to step two of the analysis and determine if the University of Montevallo waived its immunity and consented to the present action. The court determines that the University has not waived its Eleventh Amendment immunity in the instant action. Section 14 of the Alabama Constitution states, "the State of Alabama shall never be made a defendant in any court of law or equity." Ala. Const. of 1901, § 14 (1975). Accordingly, Alabama has expressly reserved its sovereign immunity.

Now the court must proceed through the third step of the multi-tiered analysis, namely, whether or not Congress has expressly abrogated the University's immunity. In order to determine if Congress has successfully abrogated the States' Eleventh Amendment immunity, the court must conduct a two-part inquiry. First, the court must determine that the "evidence of congressional intent [to abrogate is] both unequivocal and textual." *Dellmuth v. Muth*, 491 U.S. 223, 230, 109 S. Ct. 2397, 2401 (1989). Second, the court must determine whether "Congress possessed the power under the Constitution to abrogate the states' Eleventh Amendment sovereign immunity." *Seminole Tribe of Florida v. State of Florida*, 11 F.3d 1016, 1024 (11th Cir. 1994), *aff'd*, 116 S. Ct. 1114 (1996).

In addressing Congress' intent to abrogate the states' sovereign immunity through the ADEA, the court concludes that Congress clearly and unmistakably intended to abrogate the States' Eleventh Amendment immunity. Congress expressed its intention by including in the ADEA's definition of "employer" a "State and any . . .

agency or instrumentality of a State . . ." 29 U.S.C. § 626(b) (1996). Furthermore, numerous district and circuit courts have come to the same conclusion on the issue of Congress' intent. *See, e.g., Hurd v. Pittsburgh State Univ.*, 29 F.3d 564, 564-65 (10th Cir.), *cert denied*, 115 S. Ct. 321 (1994); *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694, 700-01 (1st Cir. 1983).

The next hurdle is the one plaintiffs fail to clear: Does Congress have the power under the United States Constitution to abrogate the states' Eleventh Amendment immunity? The Supreme Court has recently reiterated that Congress cannot invade Eleventh Amendment immunity except "pursuant to a valid exercise of power" conferred by the Constitution. *Seminole Tribe*, 116 S. Ct. at 1123. In determining the sources of power, the Supreme Court had previously found that Congress possessed the power to abrogate the states' sovereign immunity when legislating pursuant to § 5 of the Fourteenth Amendment and the Commerce Clause. *See id.*; *see also Fitzpatrick*, 427 U.S. 445; *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S. Ct. 2273 (1989) (holding that Congress could abrogate the Eleventh Amendment pursuant to the Commerce Clause). However, the Supreme Court in *Seminole Tribe* overruled its plurality decision in *Union Gas Co.*, 491 U.S. 1, where the Supreme Court held that Congress could abrogate the Eleventh Amendment pursuant to the Commerce Clause, by stating that "[w]e feel bound to conclude that *Union Gas* was wrongly decided and that it should be, and now is, overruled." *Seminole Tribe*, 116 S. Ct. at 1128.

As a result of the Supreme Court decision in *Seminole Tribe*, the foundation for ADEA cases against states and state entities entitled to Eleventh Amendment immunity has been removed. In *Seminole Tribe*, the Court, among other things, held that Congress cannot abrogate the Eleventh Amendment immunity enjoyed by the State when enacting legislation pursuant to the Commerce Clause.



*Id.* at 1131-32. Thus, if the ADEA was enacted by Congress only pursuant to that body's legislative power granted under the Commerce Clause, the University of Montevallo enjoys absolute immunity to MacPherson's and Narz's ADEA claim.

As *Seminole Tribe* makes clear, Congress only has the power to abrogate Eleventh Amendment immunity when enacting legislation pursuant to § 5 of the Fourteenth Amendment. Consequently, the determinative inquiry before this court is whether the ADEA was a valid exercise of that Congressional power. More specifically, because the ADEA as originally enacted in 1967 did not reach state employees, the focus of this court's attention is whether the 1974 Amendments to the ADEA, which extended coverage of the ADEA to state governments in 29 U.S.C. § 630(b)(2), were passed pursuant to § 5 of the Fourteenth Amendment.

Prior to *Seminole Tribe*, the Supreme Court had held only that the ADEA was a valid exercise of Congress' powers under the Commerce Clause. *Equal Employment Opportunity Commission v. Wyoming*, 460 U.S. 226, 235-44, 103 S. Ct. 1054, 1059-1064 (1983). In a five-four majority opinion authored by Justice Brennan, the Court expressly left open the question of whether that same conclusion could be reached under § 5 of the Fourteenth Amendment. *Id.* at 243.<sup>5</sup> Justice Stevens, who cast the deciding vote, concurred with the majority but added that his vote was limited to "construing the scope and power granted to Congress by the Commerce Clause of the Constitution." *Id.* at 244 (Stevens, J., concurring).

<sup>5</sup> Plaintiffs' argument that "the Court has already declared that Congress acted properly in extending ADEA to the states" is mistaken. The Supreme Court has ruled upon the question of whether the ADEA was properly extended to the states via the Commerce Clause. The Supreme Court expressly reserved a ruling on whether the ADEA was premised upon § 5 of the Fourteenth Amendment. This court holds that it was not.

*Wyoming*, however, presents one of those rare instances where a dissenting opinion provides the more useful statement of the law. Given the majority's reluctance to take up the issue, the dissent joined by the four remaining members of the Court takes on added significance. In that opinion, Chief Justice Burger, joined by Justices Powell, Rehnquist and O'Connor, persuasively argued that the ADEA was not and could not have been passed pursuant to the Fourteenth Amendment. *Id.* at 259-63.

In addition, this court finds defendant's reasoning that the ADEA was passed along with the Fair Labor Standards Act pursuant to the same vehicle, the Commerce Clause, more plausible. If Congress intended to amend the ADEA based upon § 5 of the Fourteenth Amendment it could have done so, as it did with respect to the 1972 amendments to Title VII.<sup>6</sup> See H.R. Rep. No. 92-238, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Ad. News 2137, 2154. In fact, if Congress had any desire to base the ADEA on anything other than the Commerce Clause, it had and for that matter still has the ability to amend the ADEA separately and distinctly from the Fair Labor Standards Act. Unless and until Congress chooses § 5 of the Fourteenth Amendment as its vehicle for amending the ADEA, the ADEA's bedrock is the same as it has been since its inception in 1967, the Commerce Clause. Probably Congress chose not to invoke the Fourteenth Amendment as a basis for the ADEA because the Fourteenth Amendment is not a logical basis for a prohibition against age discrimination by a state.

<sup>6</sup> This court takes note of the well reasoned analysis of the First Circuit Court of Appeals in *Ramirez v. Puerto Rico Fire Service*, 715 F.2d 694, 700 (1st Cir. 1983). However, this court fundamentally disagrees with the notion that it slipped the collective minds of Congress to mention the Fourteenth Amendment in the 1974 amendments to the ADEA, but remember it in the 1972 amendments to Title VII.



After careful consideration of the issue and absent any expression to the contrary from the Eleventh Circuit, this court agrees with the dissenters in *Wyoming* and concludes that the ADEA was enacted pursuant to the Commerce Clause and not the Fourteenth Amendment. See *Black v. Goodman*, 736 F. Supp. 1042 (D. Mont. 1990); *Farkas v. New York State Dept. of Health*, 554 F. Supp. 24, 27-8 (N.D.N.Y. 1982), *aff'd*, 767 F.2d 907 (2d Cir.), *cert. denied*, 474 U.S. 1033, 106 S. Ct. 596 (1985). But see *Heiar v. Crawford County*, 746 F.2d 1190 (7th Cir.), *cert. denied*, 472 U.S. 1072, 105 S. Ct. 3500 (1985); *Griswold v. Alabama Dep't Indus. Relations*, 903 F. Supp. 1492 (M.D. Ala. 1995). Thus, Congress did not abrogate the University of Montevallo's entitlement to Eleventh Amendment immunity in enacting the ADEA. Because the Eleventh Amendment precludes MacPherson and Narz's action against the University of Montevallo, defendant's motion to dismiss will be granted as the court lacks subject matter jurisdiction. A separate and appropriate order will be so entered.

DONE this 9th day of September, 1996.

/s/ William M. Acker, Jr.  
WILLIAM M. ACKER, JR.  
United States District Court

[Filed Sep. 9, 1996]

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION

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Civil Action No. 94-AR-2962-S

RODERICK MACPHERSON, *et al.*,  
Plaintiff,

vs.

UNIVERSITY OF MONTEVALLO,  
Defendant.

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ORDER

In accordance with the accompanying memorandum opinion, the court finds that it lacks subject matter jurisdiction over plaintiffs' claim under the Age Discrimination in Employment Act ("ADEA"). In addition, the court finds that plaintiffs' consent to the dismissal of their First Amendment claims and that defendant is entitled to have the claims dismissed. Accordingly, it is hereby ORDERED, ADJUDGED and DECREED that defendant's motion to dismiss is hereby GRANTED, and plaintiffs' above-styled action is hereby DISMISSED WITH PREJUDICE.

DONE this 9th day of September, 1996.

/s/ William M. Acker, Jr.  
WILLIAM M. ACKER, JR.  
United States District Court

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APPENDIX E

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 96-2788

D. C. Docket No. 95-40194-MP

J. DANIEL KIMEL, JR.; RALPH C. DOUGHERTY;  
BURTON H. ALTMAN; ROBERT W. BEARD;  
VALDALL K. BROCK, *et al.*,  
*Plaintiffs-Appellees*,

DORIS C. BAKER, *et al.*,  
*Plaintiffs*,

versus

STATE OF FLORIDA BOARD OF REGENTS,  
*Defendant-Appellant*.

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No. 96-3773

D. C. Docket No. 5:96-CV-207-RH

WELLINGTON N. DICKSON, a.k.a. DUKE,  
*Plaintiff-Appellee*,

versus

FLORIDA DEPARTMENT OF CORRECTIONS,  
Jackson County,  
*Defendant-Appellant*,

71a

JACKSON CORRECTIONAL INSTITUTION;  
JIM FOLSOM, and JAMES EDWARD CHILDS,  
a.k.a. J. E. Childs, Major,  
*Defendants*.

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On Appeal from the United States District Court  
for the Northern District of Florida

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No. 96-6947

D. C. Docket No. CV-94-AR-2962-S

RODERICK MACPHERSON; MARVIN NARZ,  
*Plaintiffs-Appellants*,

versus

UNIVERSITY OF MONTEVALLO,  
*Defendant-Appellee*,

NATIONAL EMPLOYMENT LAWYERS ASSOCIATION,  
*Amicus*,

UNITED STATES OF AMERICA,  
*Intervenor-Appellant*.

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On Appeal from the United States District Court  
for the Northern District of Alabama

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ON PETITION(S) FOR REHEARING AND  
SUGGESTION(S) OF REHEARING EN BANC

Before: HATCHETT, Chief Judge, EDMONDSON and  
COX, Circuit Judges.

**PER CURIAM:**

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ J. E. Edmondson  
J. E. EDMONDSON  
United States Circuit Judge

Filed: August 17, 1998

**APPENDIX F****STATUTORY PROVISIONS INVOLVED**

The ADEA is codified at 29 U.S.C. §§ 621-634, as follows:

**§ 621. Congressional statement of findings and purpose**

(a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.



**§ 622. Education and research program; recommendation to Congress**

(a) The Secretary of Labor shall undertake studies and provide information to labor unions, management, and the general public concerning the needs and abilities of older workers, and their potentials for continued employment and contribution to the economy. In order to achieve the purposes of this chapter, the Secretary of Labor shall carry on a continuing program of education and information, under which he may, among other measures—

(1) undertake research, and promote research, with a view to reducing barriers to the employment of older persons, and the promotion of measures for utilizing their skills;

(2) publish and otherwise make available to employers, professional societies, the various media of communication, and other interested persons the findings of studies and other materials for the promotion of employment;

(3) foster through the public employment service system and through cooperative effort the development of facilities of public and private agencies for expanding the opportunities and potentials of older persons;

(4) sponsor and assist State and community informational and educational programs.

(b) Not later than six months after the effective date of this chapter, the Secretary shall recommend to the Congress any measures he may deem desirable to change the lower or upper age limits set forth in section 631 of this title.

**§ 623. Prohibition of age discrimination**

**(a) Employer practices**

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

**(b) Employment agency practices**

It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

**(c) Labor organization practices**

It shall be unlawful for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

**(d) Opposition to unlawful practices; participation in investigation, proceedings, or litigation**

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

**(e) Printing or publication of notice or advertisement indicating preference, limitation, etc.**

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

**(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause**

It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the

particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section—

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan—

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary



retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter; or

(3) to discharge or otherwise discipline an individual for good cause.

**(g) Repealed. Pub.L. 101-239, Title VI, § 6202(b)(3)(C) (i), Dec. 19, 1989, 103 Stat. 2233**

**(h) Practices of foreign corporations controlled by American employers; foreign employers not controlled by American employers; factors determining control**

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the—

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor relations, and

(D) common ownership or financial control, of the employer and the corporation.

**(i) Employee pension benefit plans; cessation or reduction of benefit accrual or of allocation to employee account; distribution of benefits after attainment of normal retirement age; compliance; highly compensated employees**

(1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which requires or permits—

(A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, or

(B) in the case of a defined contribution plan, the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's account, because of age.

(2) Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefits accrual under the plan.

(3) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan—

(A) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee dur-



ing such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

(B) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section 1056(a)(3) of this title and section 401(a)(14)(C) of Title 26, and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 1053(a)(3)(B) of this title or section 411(a)(3)(B) of Title 26, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age.

The provisions of this paragraph shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations shall provide for the application of the preceding provisions of this paragraph to all employee pension benefit plans subject to this subsection and may provide for the application of such provisions, in the case of any such employee, with respect to any period of time within a plan year.

(4) Compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan.

(5) Paragraph (1) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414(q) of Title 26) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination

in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of Title 26.

(6) A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals.

(7) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411(b)(1)(H) of Title 26 and subparagraphs (C) and (D) of section 411(b)(2) of Title 26 shall apply with respect to the requirements of this subsection in the same manner and to the same extent as such regulations apply with respect to the requirements of such sections 411(b)(1)(H) and 411(b)(2) of Title 26.

(8) A plan shall not be treated as failing to meet the requirements of this section solely because such plan provides a normal retirement age described in section 1002(24)(B) of this title and section 411(a)(8)(B) of Title 26.

(9) For purposes of this subsection—

(A) The terms “employee pension benefit plan”, “defined benefit plan”, “defined contribution plan”, and “normal retirement age” have the meanings provided such terms in section 1002 of this title.

(B) The term “compensation” has the meaning provided by section 414(s) of Title 26.

**(j) Employment as firefighter or law enforcement officer**

It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken—

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer, the employer has complied with section 3(d)(2) of the Age Discrimination in Employment Amendments of 1996 if the individual was discharged after the date described in such section, and the individual has attained—

(A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1983; or

(B)(i) if the individual was not hired, the age of hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after September 30, 1996; or

(ii) if applicable State or local law was enacted after September 30, 1996, and the individual was discharged the higher of—

(I) the age of retirement in effect on the date of such discharge under such law; and

(II) age 55; and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

**(k) Seniority system or employee benefit plan; compliance**

A seniority system or employee benefit plan shall comply with this chapter regardless of the date of adoption of such system or plan.

**(l) Lawful practices; minimum age as condition of eligibility for retirement benefits; deductions from severance pay; reduction of long-term disability benefits**

Notwithstanding clause (i) or (ii) of subsection (f)(2)(B) of this section—

(1) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because—

(A) an employee pension benefit plan (as defined in section 1002(2) of this title) provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits; or

(B) a defined benefit plan (as defined in section 1002(35) of this title) provides for—

(i) payments that constitute the subsidized portion of an early retirement benefit; or

(ii) social security supplements for plan participants that commence before the age and terminate at the age (specified by the plan) when participants are eligible to receive reduced or unreduced old-age insurance benefits under title II of the Social Security Act (42 U.S.C. 401 et seq.), and that do not exceed such old-age insurance benefits.

(2)(A) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because following a contingent event unrelated to age—

(i) the value of any retiree health benefits received by an individual eligible for an immediate pension;

(ii) the value of any additional pension benefits that are made available solely as a result of the contingent event unrelated to age and following which the individual is eligible for not less than an immediate and unreduced pension; or

(iii) the values described in both clauses (i) and (ii);

are deducted from severance pay made available as a result of the contingent event unrelated to age.

(B) For an individual who receives immediate pension benefits that are actuarially reduced under subparagraph (A)(i), the amount of the deduction available pursuant to subparagraph (A)(i) shall be reduced by the same percentage as the reduction in the pension benefits.

(C) For purposes of this paragraph, severance pay shall include that portion of supplemental unemployment compensation benefits (as described in section 501(c)(17) of Title 26) that—

(i) constitutes additional benefits of up to 52 weeks;

(ii) has the primary purpose and effect of continuing benefits until an individual becomes eligible for an immediate and unreduced pension; and

(iii) is discontinued once the individual becomes eligible for an immediate and unreduced pension.

(D) For purposes of this paragraph and solely in order to make the deduction authorized under this paragraph, the term "retiree health benefits" means benefits provided pursuant to a group health plan covering retirees, for which (determined as of the contingent event unrelated to age)—

(i) the package of benefits provided by the employer for the retirees who are below age 65 is at least comparable to benefits provided under title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.);

(ii) the package of benefits provided by the employer for the retirees who are age 65 and above is at least comparable to that offered under a plan that provides a benefit package with one-fourth the value of benefits provided under title XVIII of such Act; or

(iii) the package of benefits provided by the employer is as described in clauses (i) and (ii).

(E)(i) If the obligation of the employer to provide retiree health benefits is of limited duration, the value for each individual shall be calculated at a rate of \$3,000 per year for benefit years before age 65, and \$750 per year for benefit years beginning at age 65 and above.

(ii) If the obligation of the employer to provide retiree health benefits is of unlimited duration, the value for each individual shall be calculated at a rate of \$48,000 for individuals below age 65, and \$24,000 for individuals age 65 and above.

(iii) The values described in clauses (i) and (ii) shall be calculated based on the age of the individual as of the date of the contingent event unrelated to age. The values are effective on October 16, 1990, and shall be adjusted on an annual basis, with respect to a contingent event that occurs subsequent to the first year after October 16, 1990, based on the medical component of the Consumer Price Index for all-urban consumers published by the Department of Labor.

(iv) If an individual is required to pay a premium for retiree health benefits, the value calculated pursuant to this subparagraph shall be reduced by whatever percentage of the overall premium the individual is required to pay.



(F) If an employer that has implemented a deduction pursuant to subparagraph (A) fails to fulfill the obligation described in subparagraph (E), any aggrieved individual may bring an action for specific performance of the obligation described in subparagraph (E). The relief shall be in addition to any other remedies provided under Federal or State law.

(3) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because an employer provides a bona fide employee benefit plan or plans under which long-term disability benefits received by an individual are reduced by any pension benefits (other than those attributable to employee contributions)—

(A) paid to the individual that the individual voluntarily elects to receive; or

(B) for which an individual who has attained the later of age 62 or normal retirement age is eligible.

**§ 624. Study by Secretary of Labor; reports to President and Congress; scope of study; implementation of study; transmittal date of reports**

(a)(1) The Secretary of Labor is directed to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement, and report his findings and any appropriate legislative recommendations to the President and to the Congress. Such study shall include—

(A) an examination of the effect of the amendment made by section 3(a) of the Age Discrimination in Employment Act Amendments of 1978 in raising the upper age limitation established by section 631(a) of this title to 70 years of age;

(B) a determination of the feasibility of eliminating such limitation;

(C) a determination of the feasibility of raising such limitation above 70 years of age; and

(D) an examination of the effect of the exemption contained in section 631(c) of this title, relating to certain executive employees, and the exemption contained in section 631(d) of this title, relating to tenured teaching personnel.

(2) The Secretary may undertake the study required by paragraph (1) of this subsection directly or by contract or other arrangement.

(b) The report required by subsection (a) of this section shall be transmitted to the President and to the Congress as an interim report not later than January 1, 1981, and in final form not later than January 1, 1982.

**§ 625. Administration**

The Secretary shall have the power—

**(a) Delegation of functions; appointment of personnel; technical assistance**

to make delegations, to appoint such agents and employees, and to pay for technical assistance on a fee for service basis, as he deems necessary to assist him in the performance of his functions under this chapter;

**(b) Cooperation with other agencies, employers, labor organizations, and employment agencies**

to cooperate with regional, State, local, and other agencies, and to cooperate with and furnish technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of this chapter.

**§ 626. Recordkeeping, investigation, and enforcement**

**(a) Attendance of witnesses; investigations, inspections, records, and homework regulations**

The Equal Employment Opportunity Commission shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.

**(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wage and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion**

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices al-

leged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

**(c) Civil actions; person aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial**

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

**(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion**

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed—

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.



Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

**(e) Reliance on administrative rulings; notice of dismissal or termination; civil action after receipt of notice**

Section 259 of this title shall apply to actions under this chapter. If a charge filed with the Commission under this chapter is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 630(a) of this title against the respondent named in the charge within 90 days after the date of the receipt of such notice.

**(f) Waiver**

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum—

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to any-

thing of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to—

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.



(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title may not be considered knowing and voluntary unless at a minimum—

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph 2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

#### **§ 627. Notices to be posted**

Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Equal Employment Opportunity Commission setting forth information as the Commission deems appropriate to effectuate the purposes of this chapter.

#### **§ 628. Rules and regulations; exemptions**

In accordance with the provisions of subchapter II of chapter 5 of Title 5, the Equal Employment Opportunity Commission may issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter, and may establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest.

#### **§ 629. Criminal penalties**

Whoever shall forcibly resist, oppose, impede, intimidate or interfere with a duly authorized representative of the Equal Employment Opportunity Commission while it is engaged in the performance of duties under this chapter shall be punished by a fine of not more than \$500 or by imprisonment for not more than one year, or by both: *Provided, however,* That no person shall be imprisoned under this section except when there has been a prior conviction hereunder.

#### **§ 630. Definitions**

For the purposes of this chapter—

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided,* That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency,

but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is fifty or more prior to July 1, 1968, or twenty-five or more on or after July 1, 1968, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [29 U.S.C.A. § 151 et seq.], or the Railway Labor Act, as amended [45 U.S.C.A. § 151 et seq.]; or

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.



(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C.A. § 401 et seq.].

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C.A. § 1331 et seq.].

(j) The term "firefighter" means an employee, the duties of whose position are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

(k) The term "law enforcement officer" means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of a State, including an employee engaged in this activity who is transferred to a supervisory or administrative position. For the purpose of this subsection, "detention" includes the duties of employees assigned to guard individuals incarcerated in any penal institution.

(l) The term "compensation, terms, conditions, or privileges of employment" encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan.

### **§ 631. Age limits**

#### **(a) Individuals at least 40 years of age**

(a) The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

#### **(b) Employees or applicants for employment in Federal Government**

In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 633a of this title, the prohibitions established in section 633a of this title shall be limited to individuals who are at least 40 years of age.

#### **(c) Bona fide executives or high policymakers**

(1) Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least \$44,000.

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the Equal Employment Opportunity Commission, after



consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.

**(d) Repealed. Pub.L. 99-592, § 6(b), Oct. 31, 1986, 100 Stat. 3344**

### **§ 632. Annual report to Congress**

The Equal Employment Opportunity Commission shall submit annually in January, a report to the Congress covering its activities for the preceding year and including such information, data and recommendations for further legislation in connection with the matters covered by this chapter as it may find advisable. Such report shall contain an evaluation and appraisal by the Commission of the effect of the minimum and maximum ages established by this chapter, together with its recommendations to the Congress. In making such evaluation and appraisal, the Commission shall take into consideration any changes which may have occurred in the general age level of the population, the effect of the chapter upon workers not covered by its provisions, and such other factors as it may deem pertinent.

### **§ 633. Federal-State relationship**

#### **(a) Federal action superseding State action**

Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action.

#### **(b) Limitation of Federal action upon commencement of State proceedings**

In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: *Provided*, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

### **§ 633a. Nondiscrimination on account of age in Federal Government employment**

#### **(a) Federal agencies affected**

All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from non-appropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, and in the Government Print-

ing Office, the General Accounting Office, and the Library of Congress shall be made free from any discrimination based on age.

**(b) Enforcement by Equal Employment Opportunity Commission and by Librarian of Congress in the Library of Congress; remedies; rules, regulations, orders, and instructions of Commission: compliance by Federal agencies; powers and duties of Commission; notification of final action on complaint of discrimination; exemptions: bona fide occupational qualification**

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission is authorized to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Equal Employment Opportunity Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall—

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a) of this section;

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Equal Employment Opportunity Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

**(c) Civil actions; jurisdiction; relief**

Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

**(d) Notice to Commission; time of notice; Commission notification of prospective defendants; Commission elimination of unlawful practices**

When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.



**(e) Duty of Government agency or official**

Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

**(f) Applicability of statutory provisions to personnel action of Federal departments, etc.**

Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of section 631(b) of this title and the provisions of this section.

**(g) Study and report to President and Congress by Equal Employment Opportunity Commission; scope**

(1) The Equal Employment Opportunity Commission shall undertake a study relating to the effects of the amendments made to this section by the Age Discrimination in Employment Act Amendments of 1978, and the effects of section 631(b) of this title.

(2) The Equal Employment Opportunity Commission shall transmit a report to the President and to the Congress containing the findings of the Commission resulting from the study of the Commission under paragraph (1) of this subsection. Such report shall be transmitted no later than January 1, 1980.

**§ 634. Authorization of appropriations**

There are hereby authorized to be appropriated such sums as may be necessary to carry out this chapter.

\* \* \* \*

The enforcement provisions of the Fair Labor Standards Act cross-referenced in 29 U.S.C. § 626(b) are also published in 29 U.S.C. and provide as follows:

**§ 211. Collection of data**

. . . .

**(b) State and local agencies and employees**

With the consent and cooperation of State agencies charged with the administration of State labor laws, the Administrator and the Secretary of Labor may for the purpose of carrying out their respective functions and duties under this chapter, utilize the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

\* \* \* \*

**§ 216. Penalties**

. . . .

**(b) Damages; right of action; attorney's fees and costs; termination of right of action**

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in



any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

**(c) Payment of wages and compensation; waiver of claims; actions by the Secretary; limitation of actions**

The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid

minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) of this section to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 206 and 207 of this title or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b) of this section, unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in section 255(a) of this title, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

**(d) Savings provisions**

In any action or proceeding commenced prior to, on, or after Aug. 8, 1956, no employer shall be subject to any liability or punishment under this chapter or the Portal-to-Portal Act of 1947 [29 U.S.C.A. § 251 et seq.]

on account of his failure to comply with any provision or provisions of this chapter or such Act (1) with respect to work heretofore or hereafter performed in a workplace to which the exemption in section 213(f) of this title is applicable, (2) with respect to work performed in Guam, the Canal Zone or Wake Island before the effective date of this amendment of subsection (d), or (3) with respect to work performed in a possession named in section 206 (a)(3) of this title at any time prior to the establishment by the Secretary, as provided therein, of a minimum wage rate applicable to such work.

**(e) Civil penalties for child labor violations**

Any person who violates the provisions of section 212 or section 213(c)(5) of this title, relating to child labor, or any regulation issued under section 212 or section 213(c)(5) of this title, shall be subject to a civil penalty of not to exceed \$10,000 for each employee who was the subject of such a violation. Any person who repeatedly or willfully violates section 206 or 207 of this title shall be subject to a civil penalty of not to exceed \$1,000 for each such violation. In determining the amount of any penalty under this subsection, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of any penalty under this subsection, when finally determined, may be—

- (1) deducted from any sums owing by the United States to the person charged;
- (2) recovered in a civil action brought by the Secretary in any court of competent jurisdiction, in which litigation the Secretary shall be represented by the Solicitor of Labor; or
- (3) ordered by the court, in an action brought for a violation of section 215(a)(4) of this title

or a repeated or willful violation of section 215 (a)(2) of this title, to be paid to the Secretary.

Any administrative determination by the Secretary of the amount of any penalty under this subsection shall be final, unless within fifteen days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section 554 of Title 5, and regulations to be promulgated by the Secretary. Except for civil penalties collected for violations of section 212 of this title, sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provisions of section 9a of this title. Civil penalties collected for violations of section 212 of this title shall be deposited in the general fund of the Treasury.

**§ 217. Injunction proceedings**

The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title, including in the case of violations of section 215(a)(2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 255 of this title).

2 2  
Nos. 98-791, 98-796

Supreme Court, U. S.

FILED

DEC 11 1998

IN THE

OFFICE OF THE CLERK

# Supreme Court of the United States

OCTOBER TERM, 1998

J. DANIEL KIMEL, JR., *et al.*,

*Petitioners,*

-and-

UNITED STATES OF AMERICA,

*Petitioner,*

vs.

FLORIDA BOARD OF REGENTS, *et al.*,

*Respondents.*

ON PETITIONS FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

## BRIEF IN OPPOSITION FOR RESPONDENT UNIVERSITY OF MONTEVALLO

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## QUESTIONS PRESENTED FOR REVIEW

1. Did Congress in the Fair Labor Standards Amendment of 1974 make its intent to abrogate the Eleventh Amendment immunity of the States "unmistakably clear" as required by *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 56 (1996)?

2. Did Congress enact the Fair Labor Standards Amendment of 1974 pursuant to the Fourteenth Amendment, which in light of *Seminole Tribe* can be the only source of authority for abrogation of the Eleventh Amendment?

3. Even if the abrogation questions (Questions 1 and 2) are answered in the affirmative, did the Fair Labor Standards Amendment of 1974 comply with the principle expressed in *City of Boerne v. Flores*, 521 U.S. 507 (1997) that the Legislative branch may not enact Fourteenth Amendment legislation exceeding the boundaries of equal protection jurisprudence as defined by the Judicial branch?

## LIST OF PARTIES

The parties to this Alabama case consist of Associate Professors Roderick MacPherson and Marvin Narz and their employer the University of Montevallo, which is an entity of the State of Alabama. The University of Montevallo is not in a position to make any representation regarding the parties to the Florida cases with which this case was consolidated for oral argument (not for briefing) in the Court of Appeals. Following consolidation for oral argument in the Court of Appeals, the United States intervened pursuant to 28 U.S.C. § 2403(a).

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## STATEMENT OF THE CASE

Professors MacPherson and Narz first sued the University under the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* (ADEA) in an earlier case which reached the Court of Appeals, *MacPherson v. University of Montevallo*, 922 F.2d 766 (11th Cir. 1991), and was subsequently settled. They then filed this their second ADEA lawsuit in the United States District Court for the Northern District of Alabama alleging age discrimination and retaliation for their first ADEA lawsuit in not being promoted to full professor and in their evaluations, salaries, committee assignments, sabbaticals, benefits, and retirement incentives.

Following *Seminole Tribe*, the District Court on the University's motion dismissed the action, holding that "the ADEA was enacted pursuant to the Commerce Clause and not the Fourteenth Amendment." 938 F. Supp. 785, 789 (N.D. Ala. 1996), App. 61a, 63a.<sup>1</sup> The Court of Appeals for the Eleventh Circuit affirmed, 139 F.3d 1426 (11th Cir. 1998), App. 1a, based on: (a) one Judge concluding that the 1974 amendment failed to comply with the requirement of an "unmistakably clear" intent to abrogate;<sup>2</sup> and (b) another Judge concluding that in light of *City of Boerne*, the 1974 amendment exceeded the bounds of equal protection jurisprudence.<sup>3</sup>

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1. To avoid duplication, references are to the Appendix in the Florida petition.

2. 139 F.3d at 1428-1433, App. 2a-13a.

3. 139 F.3d at 1444-1448, App. 38a-48a.

## REASONS FOR DENYING THE WRIT

### I.

#### THE PETITIONS ARE ASKING FOR EARLY REVISITS TO *SEMINOLE TRIBE* AND *BOERNE*

Within the immediately preceding Terms, the Court has extensively addressed the subjects of this case. The Eleventh Amendment was the subject of the Court's decisions in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) and again in the next Term in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997) (referring to "the principle, reaffirmed just last Term in *Seminole Tribe*, that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction."). The necessity of the Legislative branch respecting the boundaries of equal protection jurisprudence as established by the Judicial branch was addressed in *City of Boerne v. Flores*, 521 U.S. 507 (1997). That constitutes substantial attention in the recent Terms to those subjects.

The petitions are thus asking the Court to revisit areas of the law which it has only recently addressed extensively. But such an early revisit would hardly be appropriate at this time, particularly since (contrary to the petitioners' implication otherwise) the Circuits have not yet considered in any depth the impact of *Boerne* on the extension of ADEA coverage.<sup>4</sup>

So also, the dimensions of those recent cases are still in the process of development. Their significance

4. This point is discussed in Section III-C, *infra*.

placed them in the limited space available in the 1996 and 1997 Supreme Court Reviews.<sup>5</sup> Their impact just on employment alone is continuing to be the subject of on-going legal commentaries.<sup>6</sup>

Implicitly recognizing they are asking the Court for an early return to those 1996 and 1997 decisions, the Florida petitioners characterize their arguments as addressing "follow on questions" with respect to *Seminole Tribe*.<sup>7</sup> But it is unrealistic to ask the Supreme Court to be the final arbiter of every issue and contention arising in the myriad applications of the Court's decisions, for that would perpetually mire the Court in returning to Terms past rather than resolving the new issues arriving daily in the current Term. Unless "follow on questions" are to become an annual event, the petition's invitation should be declined.

Moreover, it would be exceedingly myopic to view *Seminole Tribe* and *Boerne* as impacting only Federal legislation regulating State employment. The cases

5. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 Supreme Court Review 1; Eisgruber and Sager, *Congressional Power and Religious Liberty After City of Boerne v. Flores*, 1997 Supreme Court Review 79.

6. E.g., Fitzpatrick, *The Effect of Seminole Tribe and the Eleventh Amendment in Employment Cases in Current Developments in Employment Law*, ALI-ABA 113 (1998); Note, *Section 5 and the Protection of Nonsuspect Classes After City of Boerne v. Flores*, 111 Harv. L. Rev. 1542 (1998).

7. Florida petition at 4-5. They disregard the *Boerne* question, even to the extent of omitting it from their questions presented.

thusfar are few, but analysis in the legal commentaries has already extended to bankruptcy law, environmental law, intellectual property law, and antitrust law.<sup>8</sup> It would thus be premature to revisit *Seminole Tribe* and *Boerne* for employment law alone before their impact on the law in general has developed in the courts below.

## II.

### THE ABROGATION QUESTIONS DO NOT WARRANT REVISITING AT THIS TIME

#### A. The Road Creating The Problems:

The abrogation questions arise from the following sequence of events:

##### 1. *The 1966 amendment to the Fair Labor Standards Act:*

As enacted in 1938, the FLSA excluded the States from coverage. Then in 1966 Congress tried to extend coverage to certain State entities by amending the definition of "employer" in the FLSA to include those State entities.<sup>9</sup> But that was an ill-fated effort, as the Court held in *Employees of the Department of Public*

8. This list is taken from Westlaw data searches of articles with the names of the cases in the title, consisting of 45 for *Seminole Tribe* and 25 for *Boerne*.

9. The State entities to which FLSA coverage was expanded in 1966 were hospitals, nursing homes, mental health facilities, elementary and secondary schools, and institutions of higher education.

*Health & Welfare v. Missouri*, 411 U.S. 279 (1973) that amending the definition of "employer" to include State entities failed to abrogate Eleventh Amendment immunity.

##### 2. *Enactment of the ADEA in 1967:*

Congress enacted the ADEA in 1967 with the States excluded. Like the FLSA, it was grounded in the Commerce Clause. From the start until today, one section of the ADEA has provided that it "shall be enforced in accordance with the powers, remedies, and procedures" provided by the FLSA, 29 U.S.C. § 626(b), and the immediately following section has provided that "[a]ny person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter," 29 U.S.C. § 626(c).

##### 3. *The Fair Labor Standards Amendment of 1974:*

Congress reacted to this Court's 1973 decision in the *Missouri* case by enacting the Fair Labor Standards Amendment of 1974.<sup>10</sup> The major purpose of the 1974 amendment was to cure the defect which resulted in the downfall of the 1966 amendment to the FLSA and to extend the coverage of the FLSA "to virtually all state and local government . . . employees." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 533 (1985).

10. P.L. 93-59, Fair Labor Standards Amendment of 1974, 1 U.S. Code Cong. and Adm. News 55 (93rd Cong., 2nd Sess. 1974).



In the process of expanding the FLSA to the States in 1974, Congress likewise expanded the ADEA to the States because doing so "is a logical extension of the committee's decision to extend FLSA coverage to Federal, State, and local government employees."<sup>11</sup> But it committed a series of errors which were to prove fatal when the Court restored the balance of power between the States and the National Government in the 1990's.

(a) *Continued reliance on the Commerce Clause*: Congress had only two years earlier relied on § 5 of the Fourteenth Amendment in extending the coverage of Title VII of the Civil Rights Act to the States. It was described as "[l]egislation to implement this aspect of the Fourteenth Amendment"<sup>12</sup> and as "fulfill[ing] the Congressional duty to enact the 'appropriate legislation' to insure that all citizens are treated equally."<sup>13</sup> So in enacting the 1972 Amendments to Title VII to extend coverage to the States as employers, Congress exercised its power under § 5 of the Fourteenth Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453 n.9 (1976). But in 1974 in contrast, Congress said nothing about the Fourteenth Amendment or equal protection and instead continued to base the extended ADEA on the Commerce Clause where it has rested from its inception.

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11. H.R. 93-913, Fair Labor Standards Amendment of 1974, 2 U.S. Code Cong. & Adm. News 2849 (93rd Cong., 2nd Sess. 1974).

12. H.R. 92-238, *Equal Employment Opportunity Act of 1972*, 2 U.S. Code Cong. & Adm. News at 2154 (92nd Cong., 2nd Sess. 1972).

13. S.R. 92-415 in *Legislative History of the Equal Employment Opportunity Act of 1972* at 420 (GPO 1972).

(b) *Definition of "employer"*: All that was done to the ADEA by the 1974 amendment was to expand the definition of "employer" to include "a State or political subdivision of a State and any agency or instrumentality of a State," 29 U.S.C. § 630(b). The *Missouri* decision in 1973 should have been ample warning that this could not abrogate the Eleventh Amendment.

(c) *The enforcement provisions*: Congress did nothing to revise the enforcement provisions of the ADEA, thus repeating the identical mistake which it had committed in 1966 in attempting to extend the FLSA to State entities. The only revision instead came in providing in the enforcement section of the FLSA that an action to recover unpaid minimum wages or unpaid overtime compensation and liquidated damages "may be maintained against any employer (including a public agency)," 29 U.S.C. § 216(b). So when the petition argues today that "Section 216(b) evinces Congress' intent that employees be permitted to sue state employers in federal court,"<sup>14</sup> it is referring to the FLSA, not to the ADEA. The sole argument is that the insertion of the parenthetical phrase "including a public agency" in the FLSA (but not the ADEA) reflected Congress' unmistakable intent to abrogate Eleventh Amendment immunity for the ADEA.

#### 4. *The Wyoming case in 1983:*

In the era when Congress could abrogate the Eleventh Amendment through the Commerce Clause, the 1974 errors remained buried because "[t]he

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14. United States petition at 15.

extension of the ADEA to cover state and local governments . . . was a valid exercise of Congress' powers under the Commerce Clause." *EEOC v. Wyoming*, 460 U.S. 226, 243 (1983). With the Commerce Clause being all that was needed for abrogation in those days, the majority opinion declined to consider if the 1974 extension of ADEA coverage could be sustained as Fourteenth Amendment legislation.

But in a remarkable harbinger of *City of Boerne*, then 14 years in the future, the Chief Justice and Justices Powell, Rehnquist, and O'Connor spoke on the subject. Beginning with the fact that Congress relied on the Commerce Clause in enacting the ADEA in 1967 and in extending it to the States in 1974,<sup>15</sup> they concluded that

[I]t cannot be said that in applying the Age Act to the states Congress has acted to enforce equal protection guarantees as they have been defined by this Court. 460 U.S. at 261 (dissenting opinion).

With the further position that "the Age Act can be sustained only if we assume . . . Congress can define

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15 . 460 U.S. at 251 said with reference to the Commerce Clause that:

[I]t was upon this power that Congress expressly relied when it originally enacted the Age Act in 1967 . . . and when it extended its protections to state and local government employees, see HR 93-913, pp 1-2 (1974).

rights wholly independent of our case law,"<sup>16</sup> those views expressed in 1983 are accurately described as "a preview of the Court's opinion in *City of Boerne*." *Humenansky v. Regents of the University of Minnesota*, 152 F.3d 822, 828 (8th Cir. 1998).<sup>17</sup>

### 5. *Seminole Tribe in 1996:*

The Commerce Clause foundation for the extension of ADEA coverage to the States became extinct when *Seminole Tribe* came down in 1996. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). Because "Federal jurisdiction over unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States,' "<sup>18</sup> the Court held that the case authorizing abrogation through the Commerce Clause<sup>19</sup> "was wrongly decided, and that it should be, and now is, overruled." The result is that only the Fourteenth Amendment "operated to alter the pre-existing balance between the state and federal power achieved by Article III and the Eleventh Amendment" and it alone can authorize abrogation. 517 U.S. at 65-66.

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16. 460 U.S. at 262.

17. Compare the District Court's comment in this case that

*Wyoming*, however, presents one of those rare instances where a dissenting opinion provides the more useful statement of the law. 938 F. Supp. at 788, App. 67a.

18. 517 U.S. at 54.

19. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).



That is the reason for today's revisionist arguments that: (a) the Court should say the Fair Labor Standards Amendment of 1974 was enacted pursuant to the Fourteenth Amendment; and (b) if that is an overreach, the Court should say that Congress "could have" used the Fourteenth Amendment.

**B. The Court Need Not And Should Not Revisit The Abrogation Questions At This Time:**

The abrogation questions — whether the 1974 amendment expressed an unmistakable intent to abrogate the Eleventh Amendment for the ADEA and whether it was enacted pursuant to the Commerce Clause or the Fourteenth Amendment — need not and should not be considered by the Court at this point in time for the following reasons:

**1. They are immeasurably less important than the *Boerne* question:**

Defective abrogation means only that employees may not sue their State employers based on Commerce Clause legislation in Federal Court because the Eleventh Amendment says they cannot do so. It does not limit "other methods of ensuring the States' compliance with federal law." *Seminole Tribe*, 517 U.S. at 71 n.14. Most notably, since the Eleventh Amendment is not applicable to the United States, the Federal Government can continue to sue State employers. Moreover, employees themselves can sue in State Court under the State laws proscribing age discrimination.<sup>20</sup>

20 . The majority of the States have such laws, including all the States in the Eleventh Circuit. Ala. Code Sections 25-1-20, *et seq.*, Fla. Code Title XLIV Chapter 760 Sections 760.0, *et seq.*, and Ga. Code Title 34 Chapter I Section 34-1-2.

The *Boerne* question, in contrast, has far-reaching dimensions. Even assuming *arguendo* the fictions that the 1974 amendment expressed an unmistakable intent to abrogate the Eleventh Amendment for the ADEA merely by inserting a parenthetical phrase in the FLSA, and further that it was with total silence based on the Fourteenth Amendment, the extension of coverage would remain a nullity if — as we say is the case — Congress exceeded the boundaries of equal protection jurisprudence as delineated by the Judicial branch.

There is accordingly no consideration impelling a revisit to the Eleventh Amendment following *Seminole Tribe* in 1996 and *Coeur d'Alene* in 1997.

**2. The Legislative branch should be given the opportunity to repair the errors of 1974:**

The abrogation questions indisputably arise because of the serial errors in the Fair Labor Standards Amendment of 1974. It rested the extension of ADEA coverage on the same Commerce Clause foundation which had been used in enacting the Act in 1967, even though the Fourteenth Amendment had been used in extending Title VII coverage only two years earlier in 1972. It attempted to expand coverage by adding States to the definition of "employer," although the *Missouri* decision just the year before held that could not be done. It was content to alter not a comma in the enforcement provisions of the ADEA, once again disregarding the teaching of *Missouri*.

The abrogation questions are thus attributable to the defects which the Legislative branch created in 1974. There is no sound reason for this Court to be



called upon to bring order out of this 1974 chaos. Just as the Court cannot permit Congress to declare the dimensions of the Constitution, an equal and reciprocal respect for the Legislative branch leads to the conclusion that Congress should be allowed the opportunity to correct the errors it committed in 1974.

The sensible solution for the abrogation questions would therefore be to give Congress the opportunity to enact an amendment extending ADEA coverage to the States accompanied by the requisite expression of unmistakable intent to abrogate and based on the Fourteenth Amendment. It would be easy enough for Congress to do so. It need do nothing more than track the recitals it used in enacting the Americans with Disabilities Act in 1990 in which it provided that "[a] State shall not be immune under the eleventh amendment," defined those with disabilities as "a discrete and insular minority," and said that it was relying on "the power to enforce the fourteenth amendment."<sup>21</sup>

With that done, the overriding *Boerne* question would remain, but this Court could then decide it without having to return once more to Eleventh Amendment analysis which has within the last Terms been the subject of both *Seminole Tribe* and *Coeur d'Alene*.

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21. 42 U.S.C. §§ 12101(a) and (b), § 12202. The point is not that such explicit declarations are necessarily essential but rather that Congress is well aware of the methods it must use to adhere to the limits of the Constitution as established by this Court.

### III.

#### THIS IS NOT THE TIME OR THE CASE FOR REVISITING *BOERNE*

*City of Boerne v. Flores*, 521 U.S. 507 (1997) is an epochal chapter in the balance of power among the branches of the Federal Government. It tells us that Congress "has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation" and has no "power to decree the substance of the Fourteenth Amendment's restrictions on the States." As applied to the 1974 extension of coverage of the ADEA, the question brings to the forefront the position taken by four Justices in 1983 that "it cannot be said that in applying the Age Act to the states Congress has acted to enforce equal protection guarantees as they have been defined by this Court." *Wyoming*, 460 U.S. at 261.

But this is neither the case nor the time for resolution of that question for multiple reasons.

#### A. The Anomaly Of Taking Up A Question Which Is Not Among The Questions Presented By The Petitions:

While *Boerne* is related to the abrogation questions in the sense that abrogation requires a valid exercise of power, the dimensions of *Boerne* extend far beyond that point, as illustrated by the fact the case itself concerned no abrogation issue. So assuming the abrogation questions are cured by Congress, the extension of ADEA coverage to the States will in the final analysis turn on whether such legislation respects

or oversteps the boundaries of equal protection jurisprudence.

But this question is virtually invisible in the questions presented by the petitions. The Florida petition presents nothing but the single question whether the Eleventh Amendment bars an ADEA action in Federal Court. The United States presents the question only in terms of whether the Fair Labor Standards Amendment of 1974 was a valid exercise of the power of Congress, which is simply a by-product application of *Boerne*. Both petitions muddy the issue by saying the concurring Eleventh Circuit Judge “adopted the position that the ADEA failed the *Seminole Tribe* abrogation test”<sup>22</sup> because the concurring opinion essentially by-passed the abrogation questions and honed in on *City of Boerne* by concluding that “[t]he ADEA does not qualify under *Boerne*’s rule as a proper exercise of Congress’s § 5 power.” 139 F.3d at 1446, App. 43a.

It is obvious that the petitions have framed their questions presented in a manner designed to avoid or minimize Court consideration of that question. Perhaps they recognize that the question should be taken up in a case in which it is the only issue, unencumbered by any abrogation questions. More likely, they have a motive for attempting to focus the Court’s attention on the abrogation questions because that is the principal division in the “Circuit split” on which they rely. The fact remains that it would most assuredly be anomalous to embark on resolution of the *Boerne* question when it has not been presented at all by one petition and is only indirectly presented by the other petition.

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22. Florida petition at 9, United States petition at 6.

## **B. The *Boerne* Question Came Into This Case At The Eleventh Hour:**

With the Court’s rules requiring the submission of the decisions of the courts below, it cannot be doubted that Supreme Court review is best conducted against the background of the rulings from both the District Court and the Court of Appeals on the issues. That could not be done here.

*Boerne* could not have been considered by the District Court since the ruling at that stage came in 1996 before *Boerne* in 1997. So also, since *Boerne* was decided after briefing in the Court of Appeals, it was not covered by any of the briefs, instead being brought to the Court of Appeals by FRAP 28(j) submissions.

It follows that the question of whether the Fair Labor Standards Amendment of 1974 was a case of Congress declaring equal protection rights without regard to equal protection jurisprudence should be considered by this Court in a case in which the issue has been fully developed in the courts below.

## **C. The Circuits Have As Yet Given Only Sparse Consideration To The *Boerne* Question As It Applies To The ADEA:**

The petitions for obvious reasons sound the trumpets for the “Circuit split,” but that is meaningless without pinpointing the fracture line. That line principally concerns the Eleventh Amendment



abrogation questions, not the *Boerne* question.<sup>23</sup> With *Boerne* being of recent vintage, the Circuits have as yet given only sparse consideration to the impact of it on the extension of the ADEA to the States in 1974.

### 1. The cases which preceded *Boerne*:

Most of the cases featured by the petitions antedated *Boerne* and therefore could not have addressed the question. *Ramirez v. Puerto Rico Fire Service*, 715 F.2d 694 (1st Cir. 1983); *Arritt v. Grisell*, 567 F.2d 1267 (4th Cir. 1977); *EEOC v. Elrod*, 674 F.2d 601 (7th Cir. 1982); *Davidson v. Board of Governors of State Colleges and Universities*, 920 F.2d 441 (7th Cir. 1990); *Hurd v. Pittsburg State University*, 109 F.3d 1540 (10th Cir. 1997) (*Hurd II*), adhering to *Hurd I*, 29 F.3d 564 (10th Cir. 1994).<sup>24</sup> Contra, *Farkas v. New York State Department of Health*, 554 F. Supp. 24, 27 (E.D. N.Y. 1982), *aff'd*, 767 F.2d 907 (2nd Cir. 1985), *cert. denied*, 474 U.S. 1033 (1985) ("the ADEA was enacted pursuant to the Commerce Clause of the Constitution and not the fourteenth amendment").<sup>25</sup>

23. The Florida respondents are thus correct in acknowledging a split with respect to the "Eleventh Amendment challenge to the Age Discrimination in Employment Act ('ADEA')," that being the abrogation questions.

24. *Hurd II* was on April 1, 1997 prior to *City of Boerne* on June 25, 1997.

25. While petitioners cite *Santiago v. New York Department of Correctional Services*, 945 F.2d 25 (2nd Cir. 1991), *cert. denied*, 502 U.S. 1094 (1992) and *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690 (3rd Cir. 1996) among the pre-*Boerne* cases, they are not on point.

### 2. The cases since *Boerne*:

The handful of cases since *Boerne* are principally attributable to the Circuit precedent rule, with the courts adhering to their pre-*Boerne* decisions in the context of the abrogation issue. *Goshtasby v. University of Illinois*, 141 F.3d 761, 769-772 (7th Cir. 1998) adhered to Circuit precedent antedating *Boerne* and disagreed that *Boerne* called for a different view. *Debs v. Northeastern Illinois University*, 153 F.3d 390, 394 (7th Cir. 1998) likewise adhered to Circuit precedent without even mentioning *Boerne*. *Migneault v. Peck*, 158 F.3d 1131, 1136-1139 (10th Cir. 1998) similarly adhered to Circuit precedent, holding that "the *City of Boerne* decision does not alter our prior decision in *Hurd*. . . ." <sup>26</sup>

The courts which have not been drawn into the magnetic pull of the Circuit precedent rule have continued to focus primarily on the abrogation questions. *Scott v. University of Mississippi*, 148 F.3d 493, 501-503 (5th Cir. 1998) treated *Boerne* only as support for the conclusion that the 1974 amendment was enacted pursuant to the Fourteenth Amendment. *Coger v. Board of Regents of State of Tennessee*, 154 F.3d 296, 305-307 (6th Cir. 1998)<sup>27</sup> considered the

26. A Tenth Circuit law clerk was not attentive to his or her responsibility for accuracy of detail when the *Migneault* opinion was being written. It has the Court saying that "the ADEA limits its coverage to age discrimination for workers who are at least forty but less than seventy years old," 158 F.3d at 1139, but since the age 70 cap was removed in 1987, the coverage of the law is age 40 to death. 29 U.S.C. § 631(a).

27. A petition for certiorari has been filed in *Coger* (No. 98-821).



*Boerne* question but only following major attention to the abrogation questions.

**3. No consideration at all to the *Boerne* question:**

The petitions point to *Keeton v. University of Nevada System*, 150 F.3d 1055 (9th Cir. 1998) as being in the "Circuit split." The Ninth Circuit, however, considered the abrogation questions only, with no reference to *City of Boerne*.

**4. The only cases giving detailed attention to the *Boerne* question:**

The only detailed attention to the question of whether the 1974 Fair Labor Standards Amendment transgressed *Boerne* has consisted of: (a) the concurring Eleventh Circuit Judge in this case; and (b) the Eighth Circuit's holding in *Humenansky v. Regents of the University of Minnesota*, 152 F.3d 822, 828 (8th Cir. 1998) agreeing that the ADEA "exceeds Congress's § 5 powers as defined in *City of Boerne*, for the reasons set forth in Chief Justice Burger's dissenting opinion in *Wyoming*."

**5. Summary:**

With the Court's crushing caseload, it is eminently sensible that a Circuit division equates to Supreme Court review "only in instances where it is clear that the conflict is one that can be effectively resolved only by the prompt action of the Supreme Court alone."<sup>28</sup>

28. Justice Harlan as quoted in Stern, Grossman, and Shapiro, *Supreme Court Practice* (6th ed.) page 198.

The "Circuit split" here principally concerns the abrogation questions and thus is not "one that can be effectively resolved only by the prompt action of the Supreme Court alone." Instead, the Legislative branch which created those problems by the Fair Labor Standards Amendment of 1974 should be allowed the opportunity to repair them.

**D. This Case Is Not An Appropriate Vehicle For The Resolution Of The *Boerne* Question:<sup>29</sup>**

This is far from a run-of-the mill age case because it extends to the following:

**1. Retaliation:**

MacPherson and Narz rely heavily on claims of retaliation, starting with the allegation of the complaint that they have been denied committee assignments, sabbaticals, adjustments to salaries, and benefits "as a result of their filing internal grievances with Defendant, charges of discrimination with the EEOC, and a lawsuit against Defendant." But that would exceed equal protection jurisprudence. *Bernheim v. Litt*, 79 F.3d 318, 323 (2nd Cir. 1996) ("we know of no court that has recognized a claim under the equal protection clause for retaliation following complaints of racial discrimination."); *Watkins v. Bowden*, 105 F.3d 1344, 1354 (11th Cir. 1997) ("A pure or generic retaliation claim, however, simply does not implicate the Equal Protection Clause.").

29. Since this case was consolidated with the Florida cases only for oral argument in the Court of Appeals, the University of Montevallo's position throughout is limited to whether Supreme Court review of this case would or would not be in order.

## 2. *Impact without intent:*

They further place substantial reliance on the impact theory, alleging "that Defendant's practices with respect to these areas has had a disparate impact on older faculty members." Their reliance on that theory of liability is emphasized by their contention that in their first lawsuit, the Eleventh Circuit implicitly approved the application of the impact theory to age cases. *MacPherson v. University of Montevallo*, 922 F.2d at 770-773.

The Court is well aware that the impact theory imposes liability irrespective of there having been no intentional discrimination. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971) ("neutral on their face, and even neutral in terms of intent"). That could not be authorized by equal protection jurisprudence which requires proof of intentional discrimination. *Washington v. Davis*, 426 U.S. 229, 238-239 (1976) (considering differential impact and not discriminatory purpose "is not the constitutional rule.").

## 3. *Summary:*

This case is therefore not the vehicle for resolution of the *Boerne* question. First, no Circuit has as yet addressed the power of Congress to prohibit retaliation or to impose liability without intent in light of *Boerne*'s requirement that Congress's § 5 authority is to enforce equal protection jurisprudence, not to determine it. This Court would therefore be the first to consider the issues, having no backdrop of Circuit decisions on the subject. Second, it would require taking analysis a quantum step beyond the contours of legislating

against age discrimination on the authority of equal protection jurisprudence into the even further reaching questions of whether Congress could have imposed liability for retaliation and for effects irrespective of intent consistent with equal protection jurisprudence.

## E. *Concurrent Consideration Of The Impact Issue For Both The ADEA And Title VII:*

The Florida petitioners argue that concurrent consideration with *Alden v. Maine* (No. 98-436) would throw "cross-lights,"<sup>30</sup> but *Alden* concerns the entirely dissimilar situation of a State Court applying State sovereign immunity to lawsuits based on Federal laws.

What would cast illuminating cross-lights would be concurrent consideration for both the ADEA and Title VII of whether Congress was authorized by equal protection jurisprudence to impose liability on the States for practices which are unlawful only because of their effect, there being no element of discriminatory intent. That is so because the identical problem of Congress imposing liability regardless of intent exists in Title VII as applied to the States. Although the extension of Title VII coverage in 1972 was based on the Fourteenth Amendment and is therefore sustained by that source, the Court has not had occasion to consider if the 1972 Congress was authorized by equal protection jurisprudence to subject the States to liability based on impact even though there is no trace of intentional discrimination. Imposing such liability on the States would therefore best be considered at the same time for Title VII and the ADEA. It would

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30. Florida petition at 5.

hardly be consistent with economy of judicial resources to treat them at different times or in different Terms.

That is emphasized by the consideration that the Title VII plaintiffs' bar would recoil at the prospect of their much beloved impact theory of liability<sup>31</sup> being at the risk of disappearing from Title VII lawsuits against the States through a decision in an ADEA case. They would undoubtedly espouse the view that differences based on the immutable characteristics protected by Title VII are anchored in equal protection jurisprudence as contrasted with attaining ADEA status by reaching age 40, which merely "marks a stage that each of us will reach if we live out our normal span." *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313-314 (1976).

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31. As reduced to the essentials in the phrase "disparate treatment, defendant wins; disparate impact, plaintiff wins."

## CONCLUSION

Consistent with the compelling need for the Supreme Court to move on to new questions as distinguished from revisiting areas of the law which have been only recently considered, the University of Montevallo submits that certiorari should be denied.

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DEC 30 1998

No. 98-791

CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1998

J. DANIEL KIMEL, JR., *et al.*,  
*Petitioners*,  
v.

STATE OF FLORIDA BOARD OF REGENTS, *et al.*,  
*Respondents*.

On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
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IN THE  
Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-791

J. DANIEL KIMEL, JR., *et al.*,  
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STATE OF FLORIDA BOARD OF REGENTS, *et al.*,  
Respondents.

**On Petition for a Writ of Certiorari to the  
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for the Eleventh Circuit**

## REPLY BRIEF FOR PETITIONERS

## ARGUMENT

Just last week, the Second Circuit rejected the analysis of the decision below in this case, with the result that there now are eight circuits that have concluded that Congress permissibly abrogated the States' Eleventh Amendment immunity from suits by private plaintiffs in federal court under the Age Discrimination in Employment Act ("ADEA"), while two circuits, including the court below, have held the opposite. *See Cooper v. New York State Office of Mental Health*, Nos. 97-9433, 97-9543, 97-9367, 1998 U.S. App. LEXIS 31725 (2d Cir. Dec. 23, 1998).

The two agencies of the State of Florida that are respondents in this case have not opposed the petitions for certiorari filed by the petitioners herein ("*Kimel* Petition") and by the Solicitor General (*United States v. Florida*



*Board of Regents, et al.*, No. 98-796 ("Government Petition")). Rather, those respondents have filed a waiver, accompanied by a letter in which "[r]espondents acknowledge that the decision of the Eleventh Circuit . . . conflicts with the holdings of several other circuits with respect to respondents' Eleventh Amendment challenge to the [ADEA]." The Florida respondents state that they "leave it to the Court to decide" whether certiorari should be granted.

The other respondent in this case, the University of Montevallo ("the University") has seen fit to submit a Brief in Opposition, despite the fact that the University does not deny that there is a circuit conflict on both of the issues subsumed within the question presented here. Seeking to forestall review of the minority position adopted by the court below, the University argues that the circuit conflict on the question whether Congress adequately expressed an intent to abrogate the States' immunity from private suits in federal court under the ADEA is a matter that should be resolved by Congress rather than by this Court. See Brief in Opposition at 4-12. The University also suggests that the decision below does not present an appropriate vehicle to resolve the circuit conflict on the question whether Congress had the power under the Fourteenth Amendment to subject the States to such suits. See *id.* at 13-22.

For the following reasons, the University's arguments against review cannot withstand analysis, and certiorari should be granted in this case and in No. 98-796.

### I. INTENT TO ABROGATE

The University argues that Congress "committed a series of errors" in undertaking to extend the coverage of the ADEA to the States, see Brief in Opposition at 6, and that "Congress should be allowed the opportunity to correct th[os]e errors," *id.* at 12. That attribution of error

is itself erroneous, as we note in the margin.<sup>1</sup> And in any case, the University does not suggest that there is any doubt that Congress intended to abrogate State immunity from ADEA suits; the "error" the University claims to have discovered is that Congress supposedly did not use the right words to accomplish what the University tacitly concedes was a clear intent to abrogate. But the question whether Congress is required to express its intent with the excruciating clarity demanded by the University is precisely the question to be decided on the merits. And this is a question that has deeply split the circuits: two decisions hold that Congress did not sufficiently express in the ADEA its intent to abrogate the States' immunity, while every other circuit that has considered the question has held the opposite. See *Kimel* Petition at 6-8; Government

<sup>1</sup> The University asserts that when Congress extended the ADEA to the States in 1974, it failed to take heed of the decision in *Employees of the Dep't of Pub. Health & Welfare v. Missouri*, 411 U.S. 279 (1973), in which this Court held that the 1966 amendments to the Fair Labor Standards Act ("FLSA") had not clearly evinced an intent to abrogate State immunity. See Brief in Opposition at 4-5, 7, 11. That is not so. See *Cooper*, 1993 U.S. App. LEXIS at \*8-\*19. In the 1974 amendments, Congress responded to the decision in *Employees* by revising the enforcement provisions of the FLSA, which are expressly incorporated by the ADEA, see 29 U.S.C. § 626(b), to provide that private suits may be brought against "employers (including a public agency) in any Federal or State court of competent jurisdiction." 29 U.S.C. § 216(b), as amended by Pub. L. 93-259 (effective May 11, 1974) (emphasis added). See H. Rep. No. 93-913, 1974 U.S.C.C.A.N. 2811, 2850 (noting that this "amendment is necessitated by the decision of the U.S. Supreme Court in [*Employees*]").

The other "error" cited by the University is that Congress did not recite that the extension of the ADEA to the States was an exercise of Congress's power under the Fourteenth Amendment. See Brief in Opposition at 6, 10, 11. But, as this Court noted when it last considered the application of the ADEA to the States, "[t]he . . . constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *EEOC v. Wyoming*, 460 U.S. 226, 243 n.18 (1983) (quoting *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948)).

Petition at 8-9; *Cooper*, 1998 U.S. App. LEXIS at \*12-\*13.

This square conflict, with the resultant lack of uniformity in the enforcement of this important federal statute, should be resolved by this Court. It is not a matter that Congress should be expected to address, particularly where all but two of the circuits that have considered the issue have held that Congress already has expressed with sufficient clarity in the ADEA its intent to abrogate State immunity.

## II. FOURTEENTH AMENDMENT POWER

The University asserts that the question whether, under *City of Boerne v. Flores*, 521 U.S. 507 (1997), Congress had the power under Section 5 of the Fourteenth Amendment to require the States to abide by the provisions of the ADEA is "Not Among the Questions Presented by the Petitions." Brief in Opposition at 13. The University also debates whether the division in the circuits on that question is an intractable one, *id.* at 15-19, and suggests that this case is not appropriate for review because it involves claims of retaliation and disparate impact in addition to claims of intentional age discrimination, *id.* at 19-22. These efforts at avoidance are unavailing.

a. We explained at length in the petition, and the University does not dispute, that the question whether Congress had authority under the Fourteenth Amendment to extend the ADEA to the States is a necessary part of the question presented by our petition. See *Kimel* Petition at 4, 5-6, 9-12. And the United States' petition lists the Fourteenth Amendment question as a distinct question presented. See Government Petition at (i). It therefore is difficult to fathom how the University can assert that the Fourteenth Amendment issue is "virtually invisible in the questions presented by the petitions." Brief in Opposition at 14.

As for the University's suggestion that the question of Congress's authority to enact the ADEA under its Four-

teenth Amendment power "should be taken up in a case in which it is the only issue, unencumbered by any abrogation questions," *id.* at 14, the short response is that such a case will never arise. Where no issue of Eleventh Amendment immunity is presented in an ADEA suit, the question of Congress's authority under the Fourteenth Amendment simply does not arise, because Congress's Commerce Clause power is sufficient to sustain the enforceability of the ADEA in such cases. See *EEOC v. Wyoming*, 460 U.S. 226 (1983). Thus, the Fourteenth Amendment question arises *only* in cases that are, as the University puts it, "[e]ncumbered by" Eleventh Amendment immunity issues—issues that are themselves of great consequence.

b. There is no denying that, in the wake of *Boerne*, the Circuits have split 6-2 on the question whether the application of the ADEA to the States can be sustained under Congress's power to enforce the Fourteenth Amendment. See *Kimel* Petition at 9-10; Government Petition at 10; Brief in Opposition at 17-18; *Cooper*, 1998 U.S. App. LEXIS at \*20.<sup>2</sup> Any suggestion that the conflicting decisions have not given full consideration to this issue is belied by the decisions themselves. See *Kimel* Petition at 10-12. The University notes that some of the post-*Boerne* decisions upholding Congress's authority arose in circuits that had reached the same result pre-*Boerne*. See Brief in Opposition at 17. But, in reaffirming their prior decisions, those courts carefully considered *Boerne*; they simply did not find in that decision the precedent-shattering implications discerned by the University and by Judge Cox below.<sup>3</sup> And even if the University were correct in at-

<sup>2</sup> If pre-*Boerne* decisions are included, the split is 8-2. See *Kimel* Petition at 10; Government Petition at 10 n.4.

<sup>3</sup> Of the eight post-*Boerne* decisions we have cited, all but one contain explicit discussions of *Boerne*. The one exception, *Keeton v. University of Nevada System*, 150 F.3d 1055 (9th Cir. 1988), analyzes in detail why the ADEA satisfies the standard of *Katzbach v. Morgan*, 384 U.S. 641 (1966). See 150 F.3d at 1057-58. That standard, as applied in *Keeton*, remains good law after *Boerne*. See *Boerne*, 521 U.S. at —, 117 S.Ct. at 2163.



tributing some of the decisions it dislikes to "the magnetic pull of the Circuit precedent rule," Brief in Opposition at 17, the division in the circuits that has arisen on this issue is none the less real, and can only be resolved by this Court.

c. The University suggests that even if Congress has authority under the Fourteenth Amendment to prohibit intentional age discrimination by the States, the ADEA still might exceed Congress's Fourteenth Amendment power to the extent that the statute establishes causes of action for retaliation and disparate impact. *See* Brief in Opposition at 19-20. However, the three cases that are the subject of the certiorari petition all present claims of intentional age discrimination asserted against a State by a private party. The question whether federal court jurisdiction extends to such claims is squarely presented; and if that question is decided in petitioners' favor, the decisions below will be reversed.

This is an appropriate case to resolve the deep circuit split on the important question whether *any* claims under the ADEA may be pursued against a State by private plaintiffs in federal court. The suggestion that claims based on retaliation or disparate impact may call for special analysis is a nuance that could be considered by the Court in its decision of these cases, or left for further consideration on remand.<sup>4</sup>

<sup>4</sup> As the United States has observed, resolution of the question presented here may shed light on how similar issues that are being actively litigated under other federal employment laws should be resolved. *See* Government Petition at 12-13. The University proposes that the Court should wait for a case under *Title VII* that challenges the scope of Congress's Fourteenth Amendment authority. *See* Brief in Opposition at 21-22. That suggestion has no merit: the ADEA is a vitally important statute in its own right, and a circuit split that fundamentally affects the enforcement of the ADEA plainly warrants this Court's review. What is more, there are as yet no court of appeals decisions on the Title VII issue posited by the University, and it does not appear that the States as litigants are reading *Boerne* as casting doubt on the

## CONCLUSION

For the foregoing reasons and for the reasons stated in the petitions, this Court should grant the petitions for certiorari in this case and in No. 98-796.

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enforceability of Title VII in any respect. This Court should not leave unresolved the circuit split that has developed under the ADEA in order to wait for cases presenting Title VII issues that have not arisen and may never arise.



JUL 14 1999

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IN THE  
**Supreme Court of the United States**

J. DANIEL KIMEL, JR., *et al.*,  
v. *Petitioners,*

STATE OF FLORIDA BOARD OF REGENTS, *et al.*,  
*Respondents.*

UNITED STATES OF AMERICA,  
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FLORIDA BOARD OF REGENTS, *et al.*,  
*Respondents.*

On Writs of Certiorari to the  
United States Court of Appeals  
for the Eleventh Circuit

**JOINT APPENDIX**

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PETITIONS FOR CERTIORARI FILED NOVEMBER 13, 1998 (No. 98-791)  
and NOVEMBER 16, 1998 (No. 98-796)  
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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF FLORIDA  
(TALLAHASSEE)

Case No. 95-CV-40194

J. DANIEL KIMEL, JR.

v.

STATE OF FLORIDA BOARD OF REGENTS, *et al.*

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
6/5/95	2	COMPLAINT FILING FEE \$120.00 RECEIPT # 072487 (knr)
		* * *
6/7/95	6	MOTION by defendant BOARD OF REGENTS to Dismiss—added attorney Peter S. Fleitman. (knr)
		* * *
6/9/95	7	RESPONSE by plaintiff J DANIEL KIMEL JR., plaintiff RALPH C DOUGHERTY, plaintiff BURTON H ALTMAN, plaintiff DORIS C BAKER, plaintiff ROBERT W BEARD, plaintiff GEORGE BLAKELY, plaintiff VALDALL K BROCK, plaintiff JOHN D CALMAN, plaintiff ELAINE D CANCALON, plaintiff SIWO DE KLOET, plaintiff JOSEPH DONOGHUE, plaintiff PHILLIP DOWNS, plaintiff RICHARD DUNHAM, plaintiff W SCOTT FORD, plaintiff ROBERT L FULTON, plaintiff ALICE GAAR, plaintiff



DATE	NO.	PROCEEDINGS
		JOANN GARDNER, plaintiff RICHARD GLICK, plaintiff BRUCE GRINDAL, plaintiff WILLIAM HEARD, plaintiff HERMAN G JAMES, plaintiff SALLY J KARIOTH, plaintiff MICHAEL K LAUNER, plaintiff WILLIAM LEPARULO, plaintiff WINSTON LO, plaintiff DEBORAH MAHER, plaintiff RICHARD MARISCAL, plaintiff MARK MESSERSMITH, plaintiff BELEN MILLS, plaintiff RICHARD J MORRIS, plaintiff CONNIE G MORRIS, plaintiff SHARON E NICHOLSON, plaintiff LUCIA PATRICK, plaintiff ELIZABETH PETERS, plaintiff JOSEPH PETTIGREW, plaintiff MARY POHL, plaintiff JOHN QUINE, plaintiff KATHERINE SHELFER, plaintiff PATRICIA STANLEY, plaintiff JEROME STERN, plaintiff PAUL STRAIT, plaintiff CHARLES SWAIN, plaintiff SHEILA TAYLOR, plaintiff EDWARD WYNOT, plaintiff MARILYN YOUNG to [6-1] motion to Dismiss—added attorney Peter S. Fleitman by BOARD OF REGENTS. (bkp) [Entry date 06/13/95]
		* * *
7/24/95	9	ORDER denying [7-1] motion response, denying [6-1] motion to Dismiss—added attorney Peter S. Fleitman. Clerk will send out an initial scheduling order, setting 120 days for discovery. (signed by Judge Maurice M. Paul) (Copies mailed as noted on document:) (knr) [Entry date 07/25/95]
		* * *
8/7/95	12	AMENDED COMPLAINT by plaintiff J DANIEL KIMEL JR., plaintiff RALPH C DOUGHERTY, plaintiff BURTON H ALTMAN, plaintiff DORIS C BAKER, plaintiff ROBERT W BEARD, plaintiff GEORGE BLAKELY, plaintiff VALDALL K BROCK,

DATE	NO.	PROCEEDINGS
		plaintiff JOHN D CALMAN, plaintiff ELAINE D CANCALON, plaintiff SIWO DE KLOET, plaintiff JOSEPH DONOGHUE, plaintiff PHILLIP DOWNS, plaintiff RICHARD DUNHAM, plaintiff W SCOTT FORD, plaintiff ROBERT L FULTON, plaintiff ALICE GAAR, plaintiff JOANN GARDNER, plaintiff RICHARD GLICK, plaintiff BRUCE GRINDAL, plaintiff WILLIAM HEARD, plaintiff HERMAN G JAMES, plaintiff SALLY J KARIOTH, plaintiff MICHAEL K LAUNER, plaintiff WILLIAM LEPARULO, plaintiff WINSTON LO, plaintiff DEBORAH MAHER, plaintiff RICHARD MARISCAL, plaintiff MARK MESSERSMITH, plaintiff BELEN MILLS, plaintiff RICHARD J MORRIS, plaintiff CONNIE G MORRIS, plaintiff SHARON E NICHOLSON, plaintiff LUCIA PATRICK, plaintiff ELIZABETH PETERS, plaintiff JOSEPH PETTIGREW, plaintiff MARY POHL, plaintiff JOHN QUINE, plaintiff KATHERINE SHELFER, plaintiff PATRICIA STANLEY, plaintiff JEROME STERN, plaintiff PAUL STRAIT, plaintiff CHARLES SWAIN, plaintiff SHEILA TAYLOR, plaintiff EDWARD WYNOT, plaintiff MARILYN YOUNG amending [2-1] complaint and demand for jury trial (knr)
8/8/95	13	ANSWER to Complaint by defendant BOARD OF REGENTS (Attorney).; jury demand (knr) [Entry date 98/09/95]
		* * *
8/16/95	18	AMENDED COMPLAINT by plaintiff J DANIEL KIMEL JR., plaintiff RALPH C DOUGHERTY, plaintiff BURTON H ALTMAN, plaintiff DORIS C BAKER, plaintiff ROBERT W BEARD, plaintiff GEORGE BLAKELY, plaintiff VALDALL K BROCK, plaintiff JOHN D CALMAN, plaintiff

DATE	NO.	PROCEEDINGS
		ELAINE D CANCALON, plaintiff SIWO DE KLOET, plaintiff JOSEPH DONOGHUE, plaintiff PHILLIP DOWNS, plaintiff RICHARD DUNHAM, plaintiff W SCOTT FORD, plaintiff ROBERT L FULTON, plaintiff ALICE GAAR, plaintiff JOANN GARDNER, plaintiff RICHARD GLICK, plaintiff BRUCE GRINDALL, plaintiff WILLIAM HEARD, plaintiff HERMAN G JAMES, plaintiff SALLY J KARIOOTH, plaintiff MICHAEL K LAUNER, plaintiff WILLIAM LEPARULO, plaintiff WINSTON LO, plaintiff DEBORAH MAHER, plaintiff RICHARD MARISCAL, plaintiff MARK MESSERSMITH, plaintiff BELEN MILLS, plaintiff RICHARD J MORRIS, plaintiff CONNIE G MORRIS, plaintiff SHARON E NICHOLSON, plaintiff LUCIA PATRICK, plaintiff ELIZABETH PETERS, plaintiff JOSEPH PETTIGREW, plaintiff MARY POHL, plaintiff JOHN QUINE, plaintiff KATHERINE SHELFER, plaintiff PATRICIA STANLEY, plaintiff JEROME STERN, plaintiff PAUL STRAIT, plaintiff CHARLES SWAIN, plaintiff SHEILA TAYLOR, plaintiff EDWARD WYNOT, plaintiff MARILYN YOUNG, plaintiff PHILIP LAZARUS, plaintiff RONALD MARTIN, plaintiff ROBERT R MEAD DONALDSON, plaintiff WILLIAM G O'BRIEN, plaintiff RICHARD P SUGG, plaintiff CHARLES G MACDONALD, plaintiff RICHARD L IVERSON (Answer due 9/5/95 for BOARD OF REGENTS) amending [12-1] amended complaint by plaintiffs, [2-1] complaint (knr)

\* \* \*

11/15/95 35 Second AMENDED COMPLAINT by plaintiff J DANIEL KIMEL JR., plaintiff RALPH C DOUGHERTY, plaintiff BURTON H ALT-

DATE	NO.	PROCEEDINGS
		MAN, plaintiff DORIS C BAKER, plaintiff ROBERT W BEARD, plaintiff GEORGE BLAKELY, plaintiff VALDALL K BROCK, plaintiff JOHN D CALMAN, plaintiff ELAINE D CANCALON, plaintiff SIWO DE KLOET, plaintiff JOSEPH DONOGHUE, plaintiff PHILLIP DOWNS, plaintiff RICHARD DUNHAM, plaintiff W SCOTT FORD, plaintiff ROBERT L FULTON, plaintiff ALICE GAAR, plaintiff JOANN GARDNER, plaintiff RICHARD GLICK, plaintiff BRUCE GRINDALL, plaintiff WILLIAM HEARD, plaintiff HERMAN G JAMES, plaintiff SALLY J KARIOOTH, plaintiff MICHAEL K LAUNER, plaintiff WILLIAM LEPARULO, plaintiff WINSTON LO, plaintiff DEBORAH MAHER, plaintiff RICHARD MARISCAL, plaintiff MARK MESSERSMITH, plaintiff BELEN MILLS, plaintiff RICHARD J MORRIS, plaintiff CONNIE G MORRIS, plaintiff SHARON E NICHOLSON, plaintiff LUCIA PATRICK, plaintiff ELIZABETH PETERS, plaintiff JOSEPH PETTIGREW, plaintiff MARY POHL, plaintiff JOHN QUINE, plaintiff KATHERINE SHELFER, plaintiff PATRICIA STANLEY, plaintiff JEROME STERN, plaintiff PAUL STRAIT, plaintiff CHARLES SWAIN, plaintiff SHEILA TAYLOR, plaintiff EDWARD WYNOT, plaintiff MARILYN YOUNG, plaintiff PHILIP LAZARUS, plaintiff RONALD MARTIN, plaintiff ROBERT MEAD DONALDSON, plaintiff WILLIAM G O'BRIEN, plaintiff RICHARD P SUGG, plaintiff CHARLES G MACDONALD, plaintiff RICHARD L IVERSON amending (knr) [Edit date 11/15/95]

\* \* \*



DATE	NO.	PROCEEDINGS
11/28/95	42	ANSWER by defendant BOARD OF REGENTS to second amended complaint; jury demand (knr) * * *
2/20/96	63	Deft. amendment to affirmative defenses (knr)
4/19/96	86	MOTION by defendant BOARD OF REGENTS to Dismiss the complaint. (knr) [Entry date 04/22/96] * * *
4/22/96	91	3rd AMENDED COMPLAINT by plaintiff J DANIEL KIMEL JR., plaintiff RALPH C DOUGHERTY, plaintiff BURTON H ALTMAN, plaintiff ROBERT W BEARD, plaintiff VALDALL K BROCK, plaintiff JOHN D CALMAN, plaintiff ELAINE D CANCALON, plaintiff SIWO DE KLOET, plaintiff JOSEPH DONOGHUE, plaintiff PHILLIP DOWNS, plaintiff RICHARD DUNHAM, plaintiff ROBERT L FULTON, plaintiff ALICE GAAR, plaintiff RICHARD GLICK, plaintiff BRUCE GRINDAL, plaintiff WILLIAM HEARD, plaintiff HERMAN G JAMES, plaintiff WILLIAM LEPARULO, plaintiff WINSTON LO, plaintiff DEBORAH MAHER, plaintiff RICHARD MARISCAL, plaintiff CONNIE G MORRIS, plaintiff SHARON E NICHOLSON, plaintiff LUCIA PATRICK, plaintiff JOSEPH PETTIGREW, plaintiff JOHN QUINE, plaintiff KATHERINE SHELFER, JEROME STERN, plaintiff CHARLES SWAIN, plaintiff EDWARD WYNOT, plaintiff PHILIP LAZARUS, plaintiff RONALD MARTIN, plaintiff ROBERT R MEAD DONALDSON, plaintiff RICHARD P SUGG, plaintiff CHARLES G MACDONALD, plaintiff RICHARD L IVERSON (Answer due 5/13/96 for BOARD OF REGENTS) amending the complaint (smb) * * *

DATE	NO.	PROCEEDINGS
4/29/96	96	RESPONSE by plaintiff J DANIEL KIMEL JR., plaintiff RALPH C DOUGHERTY, plaintiff BURTON H ALTMAN, plaintiff ROBERT W BEARD, plaintiff VALDALL K BROCK, plaintiff JOHN D CALMAN, plaintiff ELAINE D CANCALON, plaintiff SIWO DE KLOET, plaintiff JOSEPH DONOGHUE, plaintiff PHILLIP DOWNS, plaintiff RICHARD DUNHAM, plaintiff ROBERT L FULTON, plaintiff ALICE GAAR, plaintiff RICHARD GLICK, plaintiff BRUCE GRINDAL, plaintiff WILLIAM HEARD, plaintiff HERMAN G JAMES, plaintiff WILLIAM LEPARULO, plaintiff RICHARD MARISCAL, plaintiff CONNIE G MORRIS, plaintiff SHARON E NICHOLSON, plaintiff LUCIA PATRICK, plaintiff JOSEPH PETTIGREW, plaintiff JOHN QUINE, plaintiff KATHERINE SHELFER, plaintiff JEROME STERN, plaintiff CHARLES SWAIN, plaintiff EDWARD WYNOT, plaintiff PHILIP LAZARUS, plaintiff RONALD MARTIN, plaintiff ROBERT R MEAD DONALDSON, plaintiff RICHARD P SUGG, plaintiff CHARLES G MACDONALD, plaintiff RICHARD L IVERSON to [86-1] motion to Dismiss the complaint by BOARD OF REGENTS. (bkp) * * *
5/14/96	99	ANSWER by defendant BOARD OF REGENTS to Third amended complaint; jury demand (knr) * * *
5/17/96	103	ORDER granting [84-1] motion for substitution of party-plaintiff Maxine Stern for Jerome Stern. Order denying [86-1] motion to Dismiss the complaint (signed by Judge



DATE	NO.	PROCEEDINGS
		Maurice M. Paul) (Copies mailed as noted on document:) (tdg)
		* * *
5/23/96	107	RESPONSE (Second amendment) by defendant BOARD OF REGENTS to affirmative defenses. (bkp) [Entry date 05/24/96]
		* * *
5/23/96	108	MOTION by defendant BOARD OF REGENTS to Amend [103-1] order denying dft. motion to dismiss for lack of subject matter jurisdiction (bkp) [Entry date 05/24/96]
5/23/96	113	TRIAL BRIEF by plaintiffs J DANIEL KIMEL JR., RALPH C DOUGHERTY, BURTON H ALTMAN, ROBERT W BEARD, VALDALL K BROCK, D CALMAN, ELAINE D CANCALON, SIWO DE KLOET, JOSEPH DONOGHUE, PHILLIP DOWNS, RICHARD DUNHAM, ROBERT L FULTON, ALICE GAAR, RICHARD GLICK, BRUCE GRINDAL, WILLIAM HEARD, HERMAN G JAMES, WILLIAM LEPARULO, WINSTON LO, DEBORAH MAHER, RICHARD MARISCAL, CONNIE G MORRIS, SHARON E NICHOLSON, LUCIA PATRICK, JOSEPH PETTIGREW, JOHN QUINE, KATHERINE SHELFER, CHARLES SWAIN, EDWARD WYNOT, PHILIP LAZARUS, RONALD MARTIN, ROBERT R MEAD DONALDSON, RICHARD P SUGG, CHARLES G MACDONALD, RICHARD L IVERSON, MAXINE STERN (knr) [Entry date 05/28/96]
5/23/96	114	JOINT PRETRIAL STIPULATION by plaintiffs and Defendant (knr) [Entry date 05/28/96]
		* * *
6/3/96	119	MOTION by defendant BOARD OF REGENTS to Stay pending appeal of order deny-

DATE	NO.	PROCEEDINGS
		ing dft. claim of 11th amendment immunity (bkp) [Entry date 06/04/96]
6/3/96	120	NOTICE OF INTERLOCUTORY APPEAL of [103-1] order by defendant BOARD OF REGENTS FILING FEE \$105.00 RECEIPT # 076851 (knr) [Entry date 06/05/96]
		* * *
7/22/96	127	ORDER granting [119-1] motion to Stay pending appeal of order denying dft. claim of 11th amendment immunity. Further proceedings in this cause are STAYED pending resolution by the ECCA of deft's interlocutory appeal. The parties will report to the court the status of the appeal, including when oral arguments are scheduled to be heard as well as final disposition of the appeal. This court will schedule a status conference after the ECCA has ruled on the appeal. (signed by Judge Maurice M. Paul) (Copies mailed as noted on document:) (tdg)

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ALABAMA  
(SOUTHERN)

Case No. 94-CV-2962

RODERICK MACPHERSON, *et al.*

v.

UNIVERSITY OF MONTEVALLO

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
12/8/94	1	COMPLAINT filed, amount paid \$120, receipt # 200 89717 (cko) [Entry date 12/12/94] * * *
2/6/95	3	ANSWER by defendant filed cs (cko) * * *
7/26/95	17	AMENDED complaint filed, by plaintiffs [1-1]; jury demand filed cs (cko)
7/26/95	18	AMENDED (second) complaint filed, by plaintiffs [17-1], [1-1]; jury demand filed cs (cko) * * *
8/11/95	19	ANSWER to amended complaint by defendant Univ of Montevallo filed cs (cko) [Entry date 08/14/95] * * *
5/31/96	23	MOTION by defendant Univ of Montevallo for partial summary judgment filed cs (cko) [Entry date 06/03/96] * * *

DATE	NO.	PROCEEDINGS
7/19/96	37	MEMORANDUM opinion filed (by Judge William M. Acker Jr) cm (cko)
7/19/96	38	ORDER granting in part and denying in part dft's motion for partial summary judgment [23-1] as further set out in order filed (by Judge William M. Acker Jr) cm (cko)
7/25/96	39	MOTION by defendant Univ of Montevallo to dismiss ADEA claims filed cs (cko) * * *
9/9/96	47	MEMORANDUM opinion filed (by Judge William M. Acker Jr) cm (cko)
9/9/96	48	ORDER to dismiss case with prejudice in accordance with accompanying memorandum opinion filed (by Judge William M. Acker Jr) cm (cko)
9/17/96	49	NOTICE of appeal by Roderick MacPherson, Marvin Narz from District Court decision entered 9/9/96 [48-2]; notice of appeal, order appealed from and court copy of docket entries letter mailed cm (cko)
11/22/96	34	ANSWER, affirmative defenses and jury trial demand to Complaint by defendant FLORIDA DOC; jury demand (sjw) [Entry date 11/25/96]
11/25/96	35	AMENDED NOTICE OF APPEAL by defendant [32-1] appeal by FLORIDA DOC, [29-1] order denying defendant's motion to dismiss on 11th amendment jurisdictional grounds (sjw) [Entry date 11/26/96]
11/26/96	36	ORDER denying [33-1] motion to Stay pending appeal of order denying claim of eleventh amendment immunity (signed by Judge Robert L. Hinkle) (Copies mailed as noted on document:) (sjw) * * *

DATE	NO.	PROCEEDINGS
12/27/96	42	Notice of Appeal and certified copy of docket to USCA: [35-1] appeal by FLORIDA DOC, [32-1] appeal by FLORIDA DOC (Copies mailed as noted on document:) (sjm)
* * *		
8/13/97	50	MOTION by defendant FLORIDA DOC for clarification of pre trial order dated 2/21/97 re: stay granted by USCA on 1/14/97 (sjw)
3/14/97	51	ORDER by Judge Robert L. Hinkle granting [50-1] motion for clarification of pre trial order dated 2/21/97 re: stay granted by USCA on 1/14/97. Vacating [47-1] pre-trial order. Staying proceedings pending order from USCA (Copies mailed as noted on document) (plk)

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF FLORIDA  
(PANAMA CITY)

Case No. 96-CV-207

WELLINGTON N. DICKSON

v.

FLORIDA DEPARTMENT OF CORRECTIONS

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
5/9/96	1	COMPLAINT FILING FEE \$120.00 RECEIPT # 074591 (cbp)
* * *		
8/15/96	5	MOTION by defendant JIM FOLSOM, defendant JAMES EDWARD CHILDS to Dismiss the complaint against defts FOLSOM & CHILDS (added attorney Lynn Gail Franklin). (9/2) (cbp) [Entry date 08/19/96] [Edit date 08/20/96]
* * *		
9/24/96	18	MOTION by defendant FLORIDA DOC, defendant JACKSON CORRECTION to Dismiss—added attorney Lynn Gail Franklin. (plk) [Entry date 09/25/96]
* * *		
10/1/96	20	ORDER granting [5-1] motion to Dismiss the complaint against defts FOLSOM & CHILDS denying [9-1] motion for Entry of Default



DATE	NO.	PROCEEDINGS
		as to defendant FLORIDA DOC, defendant JACKSON CORRECTION. Answer deadline to 11/1/96 for JACKSON CORRECTION, for FLORIDA DOC, to Return File to Court by 11/1/96, if no service upon DOC, Jackson Co. (signed by Judge Robert L. Hinkle) (Copies mailed as noted on document:) (sjw)
		* * *
11/5/96	29	ORDER granting in part, denying in part [18-1] motion to Dismiss. Plaintiff's claims for punitive damages are dismissed as are all claims against Jackson Correctional Institution. (signed by Judge Robert L. Hinkle) (Copies mailed as noted on document:) (plk) [Entry date 11/06/96]
		* * *
11/15/96	32	NOTICE OF APPEAL by defendant FLORIDA DOC of [29-1] order FILING FEE \$105. RECEIPT # 80221 (sjw) [Entry date 11/19/96]
11/21/96	33	MOTION by defendant FLORIDA DOC to Stay pending appeal of order denying claim of eleventh amendment immunity. (sjw) [Entry date 11/22/96]
		* * *

UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

Case No. 96-2788

J. DANIEL KIMEL, JR., *et al.*

v.

STATE OF FLORIDA BOARD OF REGENTS

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
	* * *
12/3/96	Flg. order: The motion filed by Appellants in 96-6947 to consolidate these two appeals (96-2788 & 96-6947) is GRANTED to the extent that the cases are consolidated for screening, and for oral argument if this Court determines that these cases should be orally argued. They are not consolidated for briefing purposes. The motion filed by Appellants in 96-6947 for an extension of time to file their brief is DENIED AS MOOT. The motion filed in 96-6947 by the National Employment Lawyers Association for leave to file a brief as <i>amicus curiae</i> is GRANTED. The motion filed in 96-6947 by the American Association of Retired Persons for leave to file a brief as <i>amicus curiae</i> is GRANTED. (EEC) (j)/ols
12/4/96	Flg. USA's motion to intervene.ols (12/24/96 sbmd to judge)ols
1/10/97	Flg. order: The motion to intervene filed in 96-6947 by the United States of America is GRANTED. (JFD) (j)/ols

DATE	PROCEEDINGS
1/14/97	Flg. Order Case 96-3773: Appellant's motion for stay pending appeal is GRANTED. This court, on its own motion, ORDERS that this case be consolidated with 96-2788 and 96-6947 for screening and also for oral argument, if this court determines that oral argument is appropriate. (RLA/JFD/SHB)/bmc
4/30/98	Opinion filed in 96-3773 & 96-6947. ☒☒ 96-2788, REVERSED & REMANDED 96-3773, AFFIRMED in pt./REVERSED in pt & REMANDED 96-6947 AFFIRMED
4/30/98	Judgment Entered
6/15/98	Petition for Rehearing USA/Intr.ols (96-6947)
6/19/98	Petition for Rehearing JDK/appes.ols
8/17/98	Order Denying Rehearing. ols
9/3/98	Judgment & Opinion issued to Clerk as Mandate.

UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

Case No. 96-3773

WELLINGTON N. DICKSON

v.

FLORIDA DEPARTMENT OF CORRECTIONS

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
12/18/96	Flg. appellant's motion for stay pending appeal and supporting memorandum tbs (panel 12/24/96. tbs)
12/30/96	Flg. appellee's opposition to appellant's motion for stay. tbs
01/14/97	Flg. ORDER: Appellant's motion for stay pending appeal is GRANTED. This court, on its own motion, ORDERS that this case be consolidated with 96-2788 and 96-6947 for screening, and also for oral argument, if this court determines that oral argument is appropriate. (RLA/JFD/SHB) (J) tbs (stays further district court action pending appeal) • • • •
9/19/97	Flg. Motion of U.S. To Exercise Its Right to Intervene . . . and to File the Attached Brief for the United States. (Submitted to OA panel) fd • • • •
9/29/97	ORD: Motion of the United States to exercise its right to intervene is granted. Motion of the

DATE	PROCEEDINGS
	United States to file a brief out of time is granted. (JWH) fd * * *
4/30/98	Opinion filed in 96-2788, 96-3773 & 96-6947 96-2788, REVERSED & REMANDED, 96-3773, AFFIRMED in pt./REVERSED in pt & REMANDED. 96-6947 AFFIRMED
4/30/98	Judgment Entered
5/20/98	Petition for Rehearing FI DOC/appt.ols
6/15/98	Petition for Rehearing USA/Intr.ols (96-6947)
6/15/98	Petition for Rehearing WND/appe.ols * * *
8/17/98	Order Denying Rehearing.ols * * *
9/3/98	Judgment & Opinion issued to Clerk as Mandate

UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

Case No. 96-6947

RODERICK MACPHERSON, *et al.*

v.

UNIVERSITY OF MONTEVALLO

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
12/3/96	Flg. order: The motion filed by Appellants in 96-6947 to consolidate these two appeals (96-2788 & 96-6947) is GRANTED to the extent that the cases are consolidated for screening, and for oral argument if this Court determines that these cases should be orally argued. They are not consolidated for briefing purposes. The motion filed by Appellants in 96-6947 for an extension of time to file their brief is DENIED AS MOOT. The motion filed in 96-6947 by the National Employment Lawyers Association for leave to file a brief as <i>amicus curiae</i> is GRANTED. The motion filed in 96-6947 by the American Association of Retired Persons for leave to file a brief as <i>amicus curiae</i> is GRANTED. (EEC) (j)/ols
12/05/96	Flg. Motion of the United States to exercise its right to intervene to defend the constitutionality of the Age Discrimination in Employment Act (12/24/96 sbmd to judge) ols



DATE	PROCEEDINGS
1/10/97	Flg. order: The motion to intervene filed in 96-6947 by the United States of America is GRANTED. (JFD) (j)/ols
1/14/97	Flg. Order in 96-3773: Appellant's motion for stay pending appeal is GRANTED. This court, on its own motion, ORDERS that this case be consolidated with 96-2788 & 96-6947 for screening, and also for oral argument, if this court determines that oral argument is appropriate (RLA)/(JFD/SHB)/bmc
	* * *
4/30/98	Opinion filed in 96-2788, 96-3773 & 96-6947 96-2788, REVERSED & REMANDED, 96-3773, AFFIRMED in pt./REVERSED in pt & REMANDED 96-6947 AFFIRMED.
4/30/98	Judgment Entered
	* * *
6/15/98	Petition for Rehearing USA/Intr.ols
6/15/98	Petition for Rehearing JDK/appes.ols (96-2788)
	* * *
8/17/98	Order Denying Rehearing
	* * *
9/3/98	Judgment & Opinion issued to Clerk as Mandate

[Filed Dec. 8, 1994]

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION

Case No.: CV-94-AR-2962-S

RODERICK MACPHERSON AND MARVIN NARZ,  
*Plaintiffs*

vs.

UNIVERSITY OF MONTEVALLO,  
*Defendant*

COMPLAINT

**I. Jurisdiction**

1. The jurisdiction of this Court is invoked pursuant to 28 USC § 1331, 1343(4), 2201, 2202, 1367; 29 USC § 216(b), and 626. This is a suit authorized and instituted pursuant to the "Age Discrimination Act" (ADEA), 29 USC § 621, *et seq.* The jurisdiction of this Court is invoked to secure protection of and redress deprivation of rights secured by 29 USC § 621, *et seq.*, providing for injunctive and other relief against age discrimination and retaliation, as well as, pendent state claims.

2. Plaintiffs have fulfilled all conditions precedent to the institution of this action under the ADEA. Plaintiff timely filed his charge of discrimination within 180 days of the occurrence of the last discriminatory act, and within 90 days of receipt of his notice of right to sue from the Equal Employment Opportunity Commission (EEOC).

## II. Parties

3. Plaintiff, Robert MacPherson's date of birth is August 3, 1937, and Plaintiff, Marvin Narz's date of birth is August 31, 1936. Both Plaintiffs are employed as associate professors with Defendant. Both Plaintiffs are citizens of the United States, and residents of Jefferson County, Alabama.

4. Defendant University of Montevallo is a business entity doing business in Shelby County, Alabama. Defendant is subject to ADEA in that it is engaged in an industry effecting commerce and has twenty (20) or more employees for each working day and each of twenty (20) or more calendar weeks in the current and preceding year.

## III. Claim One—Age Discrimination in Employment

5. Plaintiffs re-allege and incorporate by reference paragraphs 1-4 above with the same force and effect as if set forth in specific detail below.

6. Defendant has engaged in an ongoing pattern of discrimination against Plaintiffs since the early 1980's as a result of Plaintiffs' age and in retaliation for Plaintiffs' filing of internal grievances, and charges of discrimination with the EEOC. Plaintiffs are the two oldest faculty members at the College of Business department of Defendant.

7. Defendant has followed a continuing practice of treating younger faculty members more favorably than older faculty members. This illegal continuing practice is clearly shown in the denial of promotions, committee assignments, sabbaticals, and in salaries paid to each Plaintiff.

8. Defendant, at least in the College of Business, has used an age based evaluation system to discriminate

against both Plaintiffs in regards to denial of promotions, job related assignments, benefits and salary. Plaintiffs aver that Defendant's practice with respect to these areas has had a disparate impact on older faculty members and that Defendant has disparately treated its older faculty members.

9. Plaintiffs have been subjected to unequal treatment regarding their terms and conditions of employment because of their age, and in retaliation for their previous EEOC charges, and their lawsuit based on age discrimination. Plaintiffs previously sued Defendant in the United States District Court for the Northern District of Alabama (Case Number CV 88-B-1341-S). This matter was settled between the parties prior to trial, and is subject to a confidentiality agreement. The subject of that lawsuit were allegations by Plaintiffs against Defendant of age discrimination in the terms and conditions of their employment. That case was settled on July 10, 1992.

10. Since the settlement of the lawsuit set forth in the preceding paragraph, Defendant has engaged in a continuing practice of discrimination and retaliation against Plaintiffs. Said discrimination and retaliation was done willfully, with malicious disregard for the rights of the Plaintiffs.

11. Plaintiffs have no plain, adequate or complete remedy at law to redress the wrongs alleged herein and this suit for back pay, injunctive and declaratory judgment, and liquidated damages are their only means of securing adequate relief. Plaintiffs are now suffering and will continue to suffer irreparable injury from Defendant's unlawful policy and practices as set forth herein unless enjoined by this Court.

#### IV. *Claim Two—Freedom of Speech*

12. Plaintiffs re-allege and incorporate by reference paragraphs 1-11 above with the same force and effect as if set forth in specific detail below.

13. Plaintiffs aver that as a result of their filing internal grievances with Defendant, charges of discrimination with the EEOC, and a lawsuit against Defendant; Defendant, through the dean of the college of business, William Ward, has denied Plaintiffs committee assignments, sabbaticals, adjustments to salaries, and other benefits due Plaintiffs by virtue of their qualifications and tenure.

14. Plaintiffs allege that they have the right under the First Amendment of the United States Constitution to protest the policies and practices of Defendant. Plaintiffs have exercised these First Amendment rights by filing charges of discrimination with the EEOC, and by filing suit against Defendant, and by challenging the policies and practices of Defendant. As a result of their exercise of their First Amendment rights, Defendant has taken action against Plaintiff as set forth herein.

15. Irreparable harm has resulted to Plaintiffs in that they have been denied pay raises, committee assignments, and promotion as a result of the exercise of their First Amendment rights.

#### V. *Prayer for Relief*

WHEREFORE, Plaintiffs respectfully prays that this Court will assume jurisdiction of this action and after trial:

1. Issue a declaratory judgment that the employment policies, practices, procedures, conditions and customs of Defendant are violative of the rights of Plaintiffs, as se-

cured by ADEA and the First Amendment of the Constitution.

2. Grant Plaintiffs a permanent injunction enjoining Defendant, its agents, its successors, employees, attorneys and those acting in concert with Defendant, and at Defendants request from continuing to violate ADEA and the First Amendment.

3. Enter an order requiring Defendant to make Plaintiffs whole by awarding each of them their back pay (plus interest), by promoting them to full professor, appointing them to committee assignments appropriate with their tenure and qualifications, provide sabbatical leave for Plaintiffs, each of which were lost as a result of Defendant's discriminatory practices alleged herein, as well as, by awarding them nominal, compensatory and punitive damages.

4. Plaintiffs pray for such other relief and benefits as the cause of justice may require, including but not limited to an award of costs, attorney's fees and expenses.

Respectfully submitted,

/s/ David R. Arendall  
DAVID R. ARENDALL  
Attorney for Plaintiffs  
1650 Financial Center  
505 North 20th Street  
Birmingham, AL 35203  
(205) 252-1550



PLAINTIFFS DEMAND TRIAL BY STRUCK  
JURY.

/s/ David R. Arendall  
DAVID R. ARENDALL

DEFENDANT'S ADDRESS:

c/o Office of the President  
Station 6001  
Montevallo, AL 35115

[Filed May 26, 1995]

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION

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Case No.: CV 88-B-1341-S

RODERICK MACPHERSON AND MARVIN NARZ  
*Plaintiffs*

vs.

UNIVERSITY OF MONTEVALLO  
*Defendant*

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AMENDED COMPLAINT

Come now the Plaintiffs and amend their complaint, originally filed on December 8, 1994 by the addition thereto of the following:

*CLAIM THREE*

16. Plaintiffs incorporate by reference, as if fully set forth herein, each and every material averment contained in their original complaint, filed December 8, 1994, paragraphs 1-15.

17. In December 19, 1994, Plaintiff MacPherson was denied an incentive retirement package. Plaintiff Narz was denied a similar incentive retirement package in March, 1995. No reason was given by officials with Defendant for the denial of these retirement packages for Plaintiffs, although they had been granted to other employees who had not filed charges and lawsuits alleging age discrimination and retaliation, as had Plaintiffs.

18. In March, 1995, both Plaintiffs were denied promotions to full professorship by officials with Defendant. Neither Plaintiff was justifiably denied such promotions.

19. Plaintiffs aver that the above mentioned denials by officials with Defendant were based upon Plaintiffs' age and/or in retaliation for Plaintiffs' claims of age discrimination previously made to Defendant. These denials are part of a continuing practice by Defendant of treating younger faculty members, and those members not alleging claims of discrimination against Defendant, more favorably than Plaintiffs.

20. Plaintiffs have no plain, adequate, or complete remedy at law to redress the wrongs alleged herein and this suit for back pay, injunctive and declaratory relief, and liquidated damages are their only means of securing adequate relief. Plaintiffs are now suffering and will continue to suffer irreparable injury from Defendant's unlawful policies and practices as set forth, unless enjoined by this Court.

WHEREFORE, Plaintiffs pray that this Court will enter an Order requiring Defendant to make Plaintiffs whole by awarding each of them their back pay, plus interest, by promoting them to full professor, by requiring them to offer the incentive retirement packages offered to other employees, as well as liquidated damages, their attorney's fees, expenses and costs.

Respectfully submitted,

/s/ David R. Arendall  
DAVID R. ARENDALL  
Attorneys for the Plaintiffs  
1650 Financial Center  
505 North 20th Street  
Birmingham, AL 35203  
(205) 252-1550

[Filed June 30, 1995]

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION

\_\_\_\_\_  
[Caption Omitted]  
\_\_\_\_\_

SECOND AMENDED COMPLAINT

Come now the Plaintiffs and amend their complaint, originally filed on December 18, 1994 by the addition thereto of the following:

21. Plaintiffs amend paragraph 17 of their Amended Complaint by the deletion of the dates of December 19, 1994 and March, 1995 and the substitution thereof of "prior to November 19, 1994".

CLAIM FOUR

22. Plaintiffs incorporate by reference, as if fully set forth herein, each and every material averment contained in their original complaint, as is amended, paragraphs 1-20.

23. Defendant has unlawfully discriminated against Plaintiffs by allowing Plaintiffs to be harassed by their superiors, including Dean William Word, as agent/employees of Defendant. This harassment has taken place over a continuous period of several years, and has made Plaintiffs' working conditions intolerable.

24. Throughout the period that both Plaintiffs have been employed with Defendant, they have been denied salary increases, sabbatical leave, teaching assignments,

early retirement benefit packages, committee assignments and other conditions of their employment, which have been granted to other employees. This harassment, and denial of benefits and conditions of their employment has been as a direct result of Plaintiffs' age, and in retaliation for Plaintiffs' claims of age discrimination.

25. Defendant has condoned and ratified the actions of its agent/employees, including Dean William Word. Defendant has knowledge of the actual conduct and has failed to take adequate steps to remedy the situation.

26. Plaintiffs' have no plain, adequate or complete remedy at law to redress the wrongs alleged herein in this suit for backpay, injunctive and declaratory judgment are their only means of securing adequate relief. Plaintiffs are now suffering and will continue to suffer irreparable injury from Defendant's unlawful policies and practices as set forth herein unless enjoined by this Court. Plaintiffs further pray for such other and different relief which justice may require, including but not limited to an award of costs, attorney's fees and expenses.

Respectfully submitted,

/s/ David R. Arendall  
DAVID R. ARENDALL  
Attorney for the Plaintiffs  
1650 Financial Center  
505 North 20th Street  
Birmingham, AL 35203  
(205) 252-1550

[Filed Jul. 25, 1995]

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION

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Case No. TCA 95-40194-MMP

J. DANIEL KIMEL, JR., *et al.*,  
Plaintiffs,

v.

FLORIDA BOARD OF REGENTS,  
Defendant.

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**ORDER**

This cause comes before the Court upon Defendant's motion to dismiss and alternative motion for a more definite statement (doc. 6), to which Plaintiffs have responded (doc. 7). For the reasons outlined below, Defendant's motions are DENIED.

**BACKGROUND:**

Plaintiffs are all over 40 years old, and are current and former faculty and librarians at Florida State University. Plaintiffs allege that in 1991, the United Faculty of Florida and Defendant Florida Board of Regents agreed to apply market adjustments to the salary of eligible State University employees. These market adjustments

. . . were intended to equalize the salaries of long-time employees of the Defendant whose previous yearly raises did not adequately reflect the market



value of the services provided by such employees commensurate with their experience and when compared with employees more recently hired (Complaint, doc. 2 at ¶ 10).

The Board of Regents disbursed salaries based on the market adjustments during the 1991-92 fiscal year.

However, late in the 1992-93 fiscal year, Plaintiffs allege the Board notified the United Faculty of Florida that the Board would no longer require the State University System to provide the market adjustments. Florida State University subsequently stopped paying eligible employees, including Plaintiffs, the market adjustments for the remainder of the 1992-93 fiscal year. According to the complaint, Florida State University has continued to refuse to adjust Plaintiffs' base salaries to include the market adjustments, even though funds were made available for such adjustments during the 1993-94 and 1994-95 fiscal years.

Plaintiffs contend that Defendant's refusal to provide the market adjustment has resulted in a disparate impact on the base pay of employees with a longer record of service—particularly older employees. According to Plaintiffs, older employees eligible for the market adjustments have seen an average salary decrease of 9.7 percent, compared to an overall 1.5 percent reduction in funds for all employees of the State University System.

Plaintiffs therefore filed the instant action pursuant to 29 U.S.C. § 621, the Age Discrimination in Employment Act ("ADEA"), and Florida Statutes Chapter 760, the Florida Human Rights Act. Plaintiffs seek an award of backpay and other lost employment benefits, liquidated damages, attorneys' fees and costs, and other relief the Court may deem appropriate. Plaintiffs allege all administrative prerequisites have been met because they filed

notice of their claims at least 60 days prior to commencing their action.<sup>1</sup> Jurisdiction is properly in this Court in that Plaintiffs' claims raise a federal question pursuant to 28 U.S.C. § 1331.

## DISCUSSION:

Defendant moves to dismiss Plaintiffs' complaint on the ground that Plaintiffs fail to sufficiently allege facts to support their ADEA and pendent state law claims<sup>2</sup> (doc. 6).

A complaint is not to be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). The burden of demonstrating no claim has been stated is on the movant. *Johnsrud v. Carter*, 620 F.2d 29, 33 (3d Cir. 1980). Furthermore, "in reviewing the sufficiency of a complaint in the context of a motion to dismiss [the court must] . . . treat all of the well-pleaded allegations of the complaint as true." *Miree v. Dekalb County, Ga.*, 433 U.S. 25, 27 n.2, 97 S.Ct. 2490, 2492 n.2, 53 L.Ed.2d 557 (1977). These pre-requisites for dismissal have not been demonstrated here.

<sup>1</sup> The ADEA provides that no civil action under the Act may be commenced until 60 days after a charge alleging unlawful discrimination has been filed with the EEOC. The charge must be filed within 180 days after the alleged unlawful employment practice occurred. See 29 U.S.C. § 626(d).

<sup>2</sup> Plaintiffs' claims under chapter 760, Florida Statutes, are parallel remedies for the ADEA, which utilizes the same prima facie case for age discrimination as found in the Act. See *Kelly v. K.D. Constr. of Fla., Inc.*, 866 F. Supp. 1406, 1411 (S.D.Fla. 1994) ("Because the Florida Human Rights Act is patterned after Title VII, federal case law dealing with Title VII also applies to the Florida Human Rights Act.").

As an initial matter, Defendant contends that Plaintiffs appear to be alleging a breach of contract claim, rather than a violation of the ADEA. However, as "masters of the complaint," *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 395, 107 S.Ct. 2425, 2431, 96 L.Ed.2d 318 (1987), Plaintiffs have chosen to ground their claims under the ADEA. Consequently, if Plaintiffs can state an ADEA claim, the court should not disturb their selection of remedies.

Defendant argues that Plaintiffs cannot state an ADEA claim. Defendant recites the prima facie case for a disparate treatment claim under the ADEA, and then states that Plaintiffs' "bare allegations" fail to allege all of the required elements of that claim (doc. 6 at 2).

Plaintiffs respond by pointing out that their ADEA claims are premised under a disparate impact, not a disparate treatment, theory (doc. 7). A disparate impact claim may be brought under the ADEA. See *MacPherson v. University of Montevallo*, 922 F.d 766, 771 (11th Cir. 1991). Generally, in order to prove a disparate impact claim, a plaintiff must show that an employer's facially neutral practice or test caused a discriminatory impact on a protected group and the practice or test cannot be justified as a matter of business necessity. *Edwards v. Wallace Community College*, 49 F.3d 1517, 1520 (11th Cir. 1995); *MacPherson*, 922 F.2d at 771. Although a plaintiff need not show a discriminatory motive, *Edwards*, 49 F.3d at 1520, a plaintiff must still isolate and identify "the specific employment practices that are allegedly responsible for any observed statistical disparities." *MacPherson*, 922 F.d at 771 (quoting *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 656, 109 S.Ct. 2115, 2124, 104 L.Ed.2d 733 (1989)).

Defendants concede that the Plaintiffs have properly alleged they are in the protected class of individuals encompassed by the ADEA.<sup>3</sup> Plaintiffs have also sufficiently alleged they were subjected to a facially neutral policy—suspending the market adjustment payments—that has had the statistical effect of creating a disparity between more tenured, older faculty members, and newer, younger, faculty members.<sup>4</sup> Drawing all inferences in Plaintiffs' favor, the complaint states a cognizable disparate impact claim under the ADEA. As a result, Defendant's motion to dismiss (doc. 6) is DENIED.

In the alternative, Defendant moves for a more definite statement. It is true that a claim made under the ADEA "must at least inform the court and the defendant generally of the reasons the plaintiff believes age discrimination has been practiced." *Dugan v. Martin Marietta Aerospace*, 760 F.2d 397, 399 (2d Cir. 1985). However, as noted above, Plaintiffs' complaint has done that. Therefore, Defendant's alternative motion for a more definite statement (doc. 6) is DENIED.

Accordingly, it is hereby

#### ORDERED AND ADJUDGED:

1. Defendant's motion to dismiss and alternative motion for a more definite statement (doc. 6) are DENIED.
2. The clerk of the court will send out an initial scheduling order, setting 120 days for discovery.

<sup>3</sup> The ADEA's prohibitions are limited to "individuals who are at least 40 years of age." 29 U.S.C. § 631 (1986).

<sup>4</sup> Plaintiffs have included a copy of the market adjustment agreement as an attachment to the complaint.

DONE AND ORDERED this 24th day of July, 1995.

/s/ Maurice M. Paul  
MAURICE M. PAUL  
Chief Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION

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Case No. CV-94-AR-2962-S

RODERICK MACPHERSON and MARVIN NARZ,  
*Plaintiffs,*

v.

UNIVERSITY OF MONTEVALLO,  
*Defendant.*

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ANSWER TO AMENDED COMPLAINT

For answer to the numbered paragraphs of the first and second amended complaint, the University of Montevallo responds as follows:

16. Defendant incorporates its responses to paragraphs 1 through 15 of its answer to the original complaint.
17. Denied.
18. Defendant admits that neither plaintiff received a promotion; the averments of this paragraph are otherwise denied.
19. Denied.
20. Denied.
21. Denied as amended.
22. Defendant incorporates its responses to paragraphs 1 through 20.
23. Denied.



24. Denied.

25. Denied to the extent the allegation implies unlawful conduct on the part of Dean Word or the University of Montevallo.

26. Denied.

#### FIRST AFFIRMATIVE DEFENSE

The complaint as amended fails to state a claim upon which relief can be granted.

#### SECOND AFFIRMATIVE DEFENSE

The complaint as amended is barred by the doctrines of *res judicata* and collateral estoppel.

#### THIRD AFFIRMATIVE DEFENSE

The complaint as amended is barred by the statute of limitations, or, in the alternative, laches.

#### FOURTH AFFIRMATIVE DEFENSE

The complaint as amended is barred by the terms of a settlement and release agreed to by plaintiffs.

#### FIFTH AFFIRMATIVE DEFENSE

The complaint as amended is barred by plaintiffs' failure to exhaust available administrative remedies.

/s/ Carl Johnson  
CARL JOHNSON  
Attorney for Defendant  
Alabama Bar No. 416-76-5997

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Birmingham, Alabama 35237  
(205) 251-2881

IN THE UNITED STATES DISTRICT  
NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION

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Case No. 95-40194-MP

J. DANIEL KIMEL, JR., RALPH C. DOUGHERTY, BURTON  
H. ALTMAN, ROBERT W. BEARD, VANDALL K. BROCK,  
JOHN D. CALMAN, ELAINE D. CANCALON, SIWO DE  
KLOET, JOSEPH F. DONOGHUE, PHILLIP E. DOWNS,  
RICHARD M. DUNHAM, ROBERT L. FULTON, ALICE C.  
GAAR, RICHARD E. GLICK, BRUCE T. GRINDAL, WIL-  
LIAM H. HEARD, HERMAN G. JAMES, JR., WILLIAM E.  
LEPARULO, WINSTON W. LO, DEBORAH B. MAHER,  
RICHARD N. MARISCAL, CONNIE G. MORRIS, SHARON E.  
NICHOLSON, LUCIA PATRICK, JOSEPH J. PETTIGREW,  
JR., JOHN R. QUINE, KATHERINE M. SHELFER, JEROME  
H. STERN, CHARLES W. SWAIN, EDWARD D. WYNOT,  
JR., PHILIP LAZARUS, RONALD W. MARTIN, ROBERT R.  
MEAD-DONALDSON, RICHARD P. SUGG, CHARLES G.  
MACDONALD, RICHARD L. IVERSON,

*Plaintiffs,*

v.

FLORIDA BOARD OF REGENTS,  
*Defendant.*

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**THIRD AMENDED COMPLAINT  
AND DEMAND FOR JURY TRIAL**

**I.**

Plaintiffs sue the Florida Board of Regents and allege  
the following:

1. This action is brought pursuant to 29 U.S.C. § 621,  
*et seq.*, the Age Discrimination in Employment Act  
("ADEA").

2. A copy of this Third Amended Complaint is being  
served upon the Department of Insurance, in accordance  
with Section 284.30, *Florida Statutes* (1993).

**II.**

**Jurisdiction and Venue**

3. Jurisdiction over this matter is invoked pursuant to  
28 U.S.C. § 1331.

4. Venue in this Court is proper pursuant to 28 U.S.C.  
§ 1391(b).

**III.**

**Parties**

5. Defendant, Florida Board of Regents, is an "em-  
ployer" as that term is defined under 29 U.S.C. § 630.

6. Plaintiffs are "employees" as that term is defined  
under 29 U.S.C. § 630.

7. Plaintiffs are all over 40 years of age, and are cur-  
rent and former faculty and librarians at Florida State  
University or Florida International University.

8. Pursuant to Equal Employment Opportunity Com-  
mission ("EEOC") rules Plaintiff Kimel filed a charge of  
discrimination with EEOC on behalf of himself and all  
long-term faculty and librarians in the protected age group  
on April 4, 1994. Plaintiffs Altman, Grindal, Shelfer and  
Kimel filed the same charge with the Florida Commission  
on Human Relations ("FCHR") after filing their charges  
with EEOC. Sixty days have elapsed since the filings  
were made at EEOC and FCHR.

## IV.

## Facts

9. In 1991, the United Faculty of Florida and Florida Board of Regents entered into a collective bargaining agreement which provided for in Article 23.1(b)(3) "Market Equity/Compression" adjustments ("market adjustments") to the salary of eligible employees of the State University System. Article 23.1(b)(3) states:

(3) Market Equity/Compression Increase. After the increases in (a), (b)(1), and (b)(2), above are implemented, the salary rate of ranked faculty members and librarians *shall additionally be increased by the amount necessary to bring it up to 80 percent of the 1989-90 Oklahoma State University/Association of Research Librarians Survey mean salaries, based upon the employees' 1991-92 rank and discipline.* (Emphasis added)

(Attached hereto as Exhibit A).

10. The market adjustments were intended to equalize the salaries of long-time employees of the Defendant whose previous yearly raises did not adequately reflect the market value of the services provided by such employees commensurate with their experience and when compared with employees more recently hired.

11. Funds were initially provided by the Florida Legislature for the market adjustments during the 1991-92 fiscal year, but were subsequently withdrawn. This withdrawal of funds was found unlawful by the Florida Supreme Court in March 1993, and these market adjustments were disbursed to all eligible employees in August 1993.

12. During the 1992-93 fiscal year, while the litigation was pending before the Florida Supreme Court, the Legisla-

ture maintained faculty salaries at the same level that it believed it had established for the 1991-92 fiscal year, after rescinding the original appropriation, resulting in an effective decrease in faculty salaries from the level originally funded and ultimately paid for the 1991-92 fiscal year.

13. The decrease in the salaries of individuals eligible for the market adjustment was significantly more than severe than those not eligible for the adjustment.

14. The legislative appropriation for fiscal year 1993-94 included funds for use at the discretion of Defendant which were sufficient to fund the market adjustment for the 1993-94 fiscal year.

15. On or about May 6, 1993, Associate Vice Chancellor, James J. Parry, acting on behalf of the Defendant Board of Regents, notified United Faculty of Florida as the certified bargaining agent of State University System faculty, including Plaintiffs, that the Defendant would not require administrators at Florida State University ("F.S.U."), Florida International University ("F.I.U.") and all other universities in the State University System to allocate available funds to provide the market adjustments to eligible individuals, including Plaintiffs, for fiscal year 1993-94.

16. Without the express directive from the Defendant Board of Regents to allocate funds for the market adjustment, F.S.U. and F.I.U. refused to allocate the available funds to continue to pay eligible individuals, including Plaintiffs, the market adjustment.

17. On November 22, 1993, the Defendant Board of Regents sustained F.S.U.'s and F.I.U.'s refusal to make the market adjustments permanent.



18. Six of the nine universities governed by Defendant used available discretionary funds to permanently adjust the base pay of faculty eligible for the market adjustment.

19. Defendant has continued to refuse to adjust Plaintiffs' base salaries to include the market adjustments notwithstanding the availability of such funds for fiscal years 1994-95 and 1995-96.

20. F.S.U.'s and F.I.U.'s decisions to not provide eligible individuals with the market adjustment using available funds has adversely affected Plaintiffs' base pay.

21. Defendant's continued refusal to provide full market adjustments to Plaintiffs during the 1993-94, 1994-95 and 1995-96 fiscal years has adversely affected their salaries and benefits of employment, widened the inequities in their pay relative to the market and more recently hired faculty and librarians, and has had a disproportionate impact on Plaintiffs.

22. Individuals most likely to be eligible for the market adjustment are employees with the most years of service at F.S.U., F.I.U. and other universities in the State University System, who are disproportionately older employees of Defendant.

23. As a result of Defendant's decision to not provide Plaintiffs with the market adjustment, Plaintiffs have sustained damages, including, but not limited to the following:

- a. Lost wages;
- b. Loss of other employment benefit.

## V.

### Claims for Relief

#### COUNT ONE—ADEA

24. Defendant's failure to provide the market adjustment has resulted in a disproportionate impact upon employees, such as Plaintiffs, who are 40 years of age or older, in violation of Section 623(a)(1) of the Age Discrimination in Employment Act, 29 U.S.C. § 623(a)(1), thereby entitling Plaintiffs to relief.

25. Defendant's failure to provide Plaintiff with the market adjustment beginning with the 1993-94 fiscal year was an intentional act of age discrimination in violation of Section 623(a)(1) of the Age Discrimination in Employment Act, 29 U.S.C. § 623(a)(1), thereby entitling Plaintiffs to relief.

#### COUNT TWO—FLORIDA HUMAN RIGHTS ACT

26. The allegations of Paragraphs 1 through 25 are realleged and incorporated as though fully set forth herein.

27. The disproportionate impact upon older employees likewise entitles Plaintiffs to the relief set forth below pursuant to Chapter 760, *Florida Statutes* (1993), as a pendent state law claim.

28. The disparate treatment of age discrimination against Plaintiffs entitles Plaintiffs to the relief set forth below pursuant to Chapter 760, *Florida Statutes* (1993), as a pendant state law claim.

29. The events giving rise to Plaintiffs' claim under Chapter 760, *Florida Statutes* (1993) arise from the same core of facts giving rise to the claim stated in Count One of this Complaint.

WHEREFORE, Plaintiffs pray that this Court render judgment in their favor for:

1. Relief in the form of an award of back pay and other lost employment benefits from the dates of discriminatory acts by Defendant to the date of judgment.
2. An award of liquidated damages pursuant to 29 U.S.C. § 626(b) in an amount equal to the total back pay and benefits award for the willful violation of the ADEA by the Defendant.
3. Permanent base salary adjustments, as appropriate, to Plaintiffs' salaries to include the market adjustment illegally denied by Defendant.
4. An award of costs and attorney's fees associated with this action.
5. Such other relief as the Court may deem proper.

## VI.

### Demand for Jury Trial

Plaintiffs respectfully demand a trial by jury on all issues so triable.

Respectfully submitted,

MEYER AND BROOKS, P.A.  
2544 Blairstone Pines Drive  
Post Office Box 1547  
Tallahassee, Florida 32302  
(904) 878-5212

By: /s/ Thomas W. Brooks  
THOMAS W. BROOKS  
Florida Bar Number: 0191034  
Attorney for Plaintiffs

(Certificate of Service Omitted in Printing)

## ARTICLE 23

### SALARIES

23.1 General Faculty Pay Plan. The Board shall provide employees in the General Faculty pay plan, except for Developmental Research School employees (see Section 23.10, below), with the following increases from funds equal to three (3) percent of the June 30, 1991, salary rate of these employees:

(a) Across-the-Board Increases. The annual salary rate of each eligible employee shall be increased by 1.5%.

(b) Other Salary Increases. The remaining portion of the three (3) percent salary increase funds shall be provided as follows:

(i) Promotion Increases. Prior to making allocation of promotion awards, the appropriate administrator should consider recommendations which may have been made through the collegial system of shared governance. Promotion increases shall be granted to full-time employees in the following amounts (proportional increases shall be granted to part-time employees):

To Assistant Professor, Associate in ———, and Assistant University Librarian—\$1,000 or 3.5% of the employee's 1990-91 base salary rate, whichever is higher;

To Associate Professor, Research Associate, Associate Curator, Associate Scholar/Scientist, Associate Engineer and Associate University Librarian—\$1,500 or 5.25% of the employee's 1990-91 base salary rate, whichever is higher; and

To Professor, Curator, Scholar/Scientist, Engineer, and University Librarian—\$2,500 or 8.75% of the employee's 1990-91 base salary rate, whichever is higher.

(2) **Salary Equity Adjustments.** Salary adjustments required by Section 240.247, Florida Statutes. The procedures for conducting the Salary Equity Study are described in Section 23.4.

(3) **Market Equity/Compression Increase.** After the increases in (a), (b)(1), and (b)(2), above are implemented, the salary rate of ranked faculty members and librarians shall additionally be increased by the amount necessary to bring it up to 80 percent of the 1989-90 Oklahoma State University Association of Research Librarians survey mean salaries, based upon the employees' 1991-92 rank and discipline.

(4) **Discretionary Salary Increases.** Funds which remain after the distribution of funds as described above shall be distributed to employees as discretionary increases. Each university may, at its option, use discretionary funds to provide salary increases to employees pursuant to Article 23.5, Merit Criteria.

a. Prior to making allocations of discretionary increases, the appropriate administrator should consider recommendations which may have been made through the collegial system of shared governance. The administrator retains the right to make the final decision concerning the allocation of such increases.

b. Complaints with respect to the amount of, and procedures leading to, the allocation of salary increases under Article 23.1(b)(4) shall not be grievable, except as they pertain to allegations of unlawful discrimination under Article 6.

**23.2 Administrative and Professional Pay Plan.** The Board shall provide employees in the Administrative and Professional pay plan with the following increases from funds equal to three (3) percent of the June 30, 1991, salary rate of these employees:

(a) **Discretionary Salary Increases, including promotions.**

(1) Prior to making allocations of discretionary increases, the appropriate administrator should consider recommendations which may have been made through the collegial system of shared governance. The administrator retains the right to make the final decision concerning the allocation of such increases.

(2) Complaints with respect to the amount of, and procedures leading to, the allocation of salary increases under Article 23.2(a) shall not be grievable, except as they pertain to allegations of unlawful discrimination under Article 6.

(b) **Salary Equity Adjustments.** Salary adjustments required by Section 240.257, Florida Statutes. The procedures for conducting the Salary Equity Study are described in Section 23.4.

**23.3 Salary Increase Increments.** No increases provided to full-time employees under Section 23.1(b)(4) shall be less than \$300; a proportional minimum amount shall be provided to part-time employees.

**23.4 Salary Equity Study.** The procedures for conducting the 1991-92 Salary Equity Study required by Section 240.247, Florida Statutes, shall include:

(a) **Self-Study.**

(1) **Notification.** No later than October 1, each university President shall notify employees of the procedures adopted by the university to conduct the salary study. The notification shall include the following statement: "In any year, an employee may seek to resolve a salary inequity due to discrimination based on race or sex either by filing a grievance under Article 6—Nondiscrimination



—or by conducting a salary equity study according to this procedure. But the employee cannot do both.”

(2) Pursuant to notification, as provided in (1), above, an employee who perceives that the factors of race or sex may have affected the employee's salary may request a meeting with the department chair (or dean or director where an administrative unit is not organized along departmental lines) to review salary data and to request assistance in preparing the employee's salary study. The employee may be assisted by a colleague, or by a representative of the UFF, at this and all subsequent meetings. The employee may notify the local UFF Chapter of the intent to conduct a salary equity self-study. The administrator shall provide reasonable assistance to the employee, including copies of available documents that the employee may request, excluding those documents that are evaluative in nature and thereby protected from access under Article II of this Agreement and Section 240.253, Florida Statutes.

(3) No later than February 7, employees may present the results of their completed studies to the appropriate dean or comparable administrator, as designated by university procedures. After providing for the review of the study, the dean, or comparable administrator, will indicate in writing to the employees whether a salary adjustment is recommended. This notification shall be provided within 21 days following the receipt of employees' completed studies.

(4) If an employee does not agree with the recommendation of the dean or comparable administrator, the employee may request that the matter be referred to the appropriate vice president for review.

(5) If the employee does not agree with the recommendation of the Vice President, the employee may re-

quest that the matter be referred to an appeals committee appointed by the President. The recommendation of the appeals committee shall be submitted to the President. In all cases, the President or designee shall make the final decision to approve or deny a salary adjustment.

(b) Administrative Review.

(1) Each university shall conduct an administrative review of salaries to ensure that any significant differences in the salaries of female and minority employees, when compared with those of male and white employees, respectively, are attributable to factors other than race or sex. The university shall ensure that the data used in the review are accurate. The administrative review shall consist of a statistical analysis and an administrative salary analysis as described in paragraphs (2) and (3), below.

(2) Statistical Analysis. Each university shall use a statistical model, to review the salaries of all full- and part-time ranked faculty in class codes 9001-9004. Each university may include other comparable ranked faculty classes in the statistical analysis. The universities shall use the statistical model in Appendix "F" as a framework for analysis, adopting it as appropriate to each university. The university's model, and the ranked faculty classes to be included in the statistical analysis, shall be provided to the UFF Chapter no later than October 1 for review prior to the university's conducting such analysis. The Chapter shall provide written comments regarding the model to the university within two (2) weeks after the model has been transmitted to the Chapter. Salaries of female and minority employees that are more than one (1) standard deviation below the salaries predicted by the statistical model shall be reviewed further, as discussed in paragraph (3) below. Female and minority employees included in the analysis whose salaries are more than one

(1) standard deviation below the predicted value shall be notified by December 1 and offered the opportunity to conduct a self-study. A list of all such employees shall be provided to the local UFF Chapter by December 1.

(3) Administrative Salary Analysis. The salaries of female and minority employees, including those identified through the statistical model, shall be reviewed by appropriate administrators to ensure that existing significant salary differences are attributable to factors other than race or sex. In cases where the salaries of female and minority employees are identified through the statistical analysis but are not subsequently recommended for equity adjustments, the appropriate administrator shall indicate in writing the factors, other than sex and race, to which the differences are attributable.

(c) The President shall report the results of the Salary Equity Study to the Chancellor and the UFF Chapter President at that university on or before May 15, or as soon thereafter as possible. The results shall be presented to the Board of Regents at its September meeting.

(d) A salary equity adjustment awarded to an employee shall be effective on the same date as other salary increases awarded the employee for the next academic year. The amount of the salary equity adjustment shall be to remedy an inequity based on race or sex existing during the academic year in which the employee's self study is submitted. Receipt of a salary equity adjustment shall have no effect on eligibility for merit or discretionary increases.

(e) In any year, as an alternative to participating in the Salary Equity Study, an employee may seek redress of salary discrimination under Article 6.2 of this Agreement by filing a grievance pursuant to Article 20 no later than thirty (30) days after the date of the notification

issued under paragraph (a)(1), above. Pursuant to Article 20.2 of this Agreement, the results of the Salary Equity Study shall not be an act or omission giving rise to a grievance under Article 20, nor shall the above procedures be grievable.

### 23.5 Merit Criteria.

(a) The employees of each academic department or equivalent unit, and of administrative units within the library, shall develop and recommend written criteria and related evaluative procedures to be used by each university for the distribution of salary increase funds which the Board shall make available for the purpose of rewarding meritorious performance.

(1) Development or revision of merit criteria and related evaluative procedures shall be initiated by a secret ballot vote of a majority of at least a quorum of the employees eligible to participate in departmental/unit governance or of the employees in administrative units within the library, or upon the initiation of the appropriate administrator.

(2) The appropriate administrator shall discuss these procedures, and the mission and goals of the department/unit and the university, with the department/unit employees who are to participate in the process.

(3) Each department/unit shall recommend merit criteria and related evaluative procedures, or revisions thereof, by a secret ballot vote of a majority of at least a quorum of the employees eligible to participate in departmental/unit governance or of the employees in administrative units within the library. These criteria shall be written standards of performance and shall be the sole basis upon which administrators shall award merit salary increases. The effective date of any revisions to criteria shall be determined in the same manner.



(4) Departments/units are encouraged to exchange and discuss drafts of their merit criteria and related evaluative procedures during the formulation process.

(5) The proposed merit criteria, and related evaluative procedures or revisions thereof, shall be reviewed by the university President or representative to ensure that they meet the following conditions.

a. Compliance with the provisions of the BOR/UFF Agreement, State and Federal law, and the Florida Administrative Code. A copy of the relevant portions of State law and the Code shall be provided to each department/unit at the outset of the process. A copy of the BOR/UFF Agreement shall also be available at the outset for reference by the department/unit.

b. Consistency with the mission and goals of the university, the college, and the department/unit.

c. Consistency with the department's/unit's annual evaluation process, which shall be based upon assigned duties that may differ among employees.

If the university President or representative determines that the recommended criteria do not meet these conditions, the proposal shall be referred back to the department/unit within one month of receipt for reconsideration, with a written statement of reasons for non-approval. No merit salary increase funds shall be provided to a department/unit until its criteria have been approved by the university President or representative.

(b) Approved merit criteria and related evaluative procedures and revisions thereof, and any related recommendations, shall be kept on file in the department/unit office and at the college and university levels. Additionally, employees in each department/unit shall be provided

with a copy of that department's/unit's current merit criteria and related evaluative procedures.

(c) The procedures, recommendations, and decisions made pursuant to Article 23.5 are not grievable. Complaints regarding the review and approval of proposed merit criteria and related evaluative procedures under Sections 23.5(a)(1) and (5) above, may be filed by the UFF with the President or representative within thirty (30) days following the date on which the UFF knew or reasonably should have known of the act or omission giving rise to the complaint. The President or representative shall seek resolution of the complaint and shall respond in writing to the complaint within thirty (30) days after it is filed. If the complaint is not satisfactorily resolved by the procedure described herein, the UFF may file the complaint with the Chancellor or representative within thirty (30) days following receipt of the university's decision. The Chancellor or representative shall seek resolution of the complaint, and shall respond in writing to the complaint within thirty (30) days of its filing.

(d) Employees may discuss the initial recommendations for their merit salary increase with the person or committee which makes the initial recommendation. A review of the implementation of this section of the Agreement shall be the subject of a consultation at each university pursuant to Article 2.2 of the agreement.

23.6 Report to Employees. Each employee shall be sent a report, on the form-prescribed in Appendix "G", not later than two (2) weeks prior to the implementation of the salary increase. Upon request, employees shall be provided the opportunity to consult with the person or committee which makes the initial recommendations regarding salary increases.



### 23.7 Report to the UFF.

(a) Two reports of the distribution of all salary increases arranged by university (one (1) alphabetically and one (1) by discipline), identifying the employee and the amount received in each of the categories, shall be made available to the UFF no later than November 15 of each year. A copy of the reports for each university shall be placed in the main library, along with the documents prescribed in Article 7.

(b) In addition to the reports described in Section 23.7(a), no later than thirty (30) days after a pay period in which any salary increases are reflected, each university shall furnish the local UFF Chapter with a copy of a report of the distribution of all employee salary increases, arranged by department or equivalent unit, identifying each employee and the amount received in each salary increase category and specifying the mean and the median merit salary increases for each department or equivalent unit, college, and for the university. A copy of each department's portion of the report shall be placed on file in the department, available upon request to any employee of the department.

### 23.8 Eligibility for Salary Increases.

(a) General Faculty pay plan employees are eligible for salary increases as follows:

(1) Across-the-Board Increases (23.1(a))—employees hired June 30, 1991, or before shall receive this increase.

(2) Promotion Increases (23.1(b)(1))—employees hired January 2, 1991, or before are eligible for such increases.

(3) Salary Equity Increases (23.1(b)(2)). Market Equity/Compression Increase (23.1(b)(3)), and Discre-

tionary Increases (23.1(b)(4))—employees are eligible for these increases regardless of hiring date.

(b) Administrative and Professional Pay Plan. Discretionary Increases (23.2(a)) and Salary Equity Increases (23.2(b))—employees are eligible for these increases regardless of hiring date.

23.9 Effective Dates for Salary Increases. Salary increases for General Faculty and Administrative and Professional pay plan employees shall be effective January 1, 1992.

23.10 Nothing contained herein shall prevent the Board from providing salary increases beyond the increases specified above.

### 23.11 Contract and Grant Funded Increases.

(a) Nothing contained herein shall prevent employees whose salaries are funded by grant agencies from being allotted raises higher than those provided in this Agreement.

(b) Employees on contracts or grants shall receive non-discretionary salary increases equivalent to similar employees on regular funding, provided that such salary increases are permitted by the terms of the contract or grant. In the event such salary increases are not permitted by the terms of the contract or grant, or in the event adequate funds are not available, the Board or its representatives shall seek to have the contract or grant modified to permit such increases.

(c) Employees on contract or grants shall be eligible for consideration for discretionary salary increases equivalent to similar employees on regular funding, provided that such salary increases are permitted by the terms of

the contract or grant and provided further that adequate funds are available for this purpose in the contract or grant. In the event adequate funds are not available, the Board or its representatives shall seek to have the contract or grant modified to permit such increase.

### 23.12 Order of Salary Increases.

#### (a) General Faculty pay plan.

- (1) Salary Equity—23.1(b)(2)
- (2) Across-the-Board—23.1(a)
- (3) Promotion—23.1(b)(1)
- (4) Market Equity/Compression—23.1(b)(3)
- (5) Discretionary—23.1(b)(4)

#### (b) Administrative and Professional pay plan.

- (1) Salary Equity—23.2(b)
- (2) Discretionary—23.2(a)

### 23.13 The Board shall provide Developmental Research School employees with the following increases:

(a) Developmental Research School/County Schedule Equity. The salaries of Developmental Research School employees (class codes 9016, 9017, 9018, and 9019) shall be increased to ensure that the 1991-92 salary rate of each employee is not less than the salaries provided to individuals by the county within which each Developmental Research School is located, based upon the degree and years of experience on the county's 1990-91 schedule.

(b) Minimum Increase. If the salary increase provided to an employee through 23.13(a), above, is less than

\$300, that employee's salary rate shall be further increased to ensure that the total salary increase provided through 23.13(a) and 23.13(b) equals \$300.

(c) Promotion Increases. Prior to making allocations of promotion awards, the appropriate administrator should consider recommendations which may have been made through the collegial system of shared governance. Promotion increases shall be granted to full-time employees in the following amounts (proportional increases shall be granted to part-time employees):

To Assistant University School Professor—\$1,000 or 3.5% of the employee's 1990-91 base salary rate, whichever is higher;

To Associate University School Professor—\$1,500 or 5.25% of the employee's 1990-91 base salary rate, whichever is higher; and

To University School Professor—\$2,500 or 8.75% of the employee's 1990-91 base salary rate, whichever is higher.

(d) Salary Equity Adjustments required by Section 240.247, Florida Statutes. The procedures for conducting the Salary Equity Study are described in Section 23.4.

#### (e) Developmental Research School Supplements.

(1) Employees in Developmental Research Schools shall receive salary supplements for the approved activities, and in the amounts, described in (2) below, under the following conditions:

a. The activity must be assigned by the Director, who shall determine which activities are to be performed and to whom they will be offered; provided that such activity must be offered in sufficient time to allow voluntary acceptance or rejection;

b. The activity must involve duties which extend beyond the normal workday, or duties for which an appropriate reduction in regular professional duties assigned during the normal work day has not been made, consistent with Article 9.8;

c. Employees shall receive a separate salary supplement for each assigned activity listed in (2) below;

d. The amount of the annual salary supplements described in (b) below, shall be paid over the period each year for which the activity is assigned; and

e. Salary supplements are not to be included in the base salary rate upon which future salary increases are calculated.

(2) Salary supplements shall be provided as follows:

a. A \$600 supplement shall be provided for the following activities:

Department chair  
Student council/government advisor  
Drama coach  
Literary magazine sponsor  
Faculty/club sponsor  
Assistant coach  
Division director/chair

b. An \$950 supplement shall be provided for the following activities:

Cheerleader sponsor/coach  
Newspaper sponsor  
Yearbook sponsor  
Head coach, junior varsity sports  
Head coach, minor sports  
Choral director

c. A \$1,300 supplement shall be provided for the following activities:

Athletic director  
Band director  
Head coach, major sports

d. A salary supplement for an activity may be paid at the next higher rate than those described above if, in the judgment of the Director, such higher rate is justified by the extent of the duties involved; however, no supplement shall exceed \$1,300.

(3) Supplements for activities other than those described above may be provided at the discretion of the university.

(f) Joint Appointments. DRS employees holding joint appointments with a department or unit in the university shall be eligible for any salary increases available to other part-time members of the bargaining unit in such department or unit of the university, with such increases appropriately pro-rated.

(g) Eligibility for Salary Increases. Developmental Research School employees are eligible for salary increases as follows:

(1) DRS/County Schedule Equity (23.13(a)), Salary Equity Increases (23.13(d)), and DRS Supplements (23.13(e)),—employees are eligible for these increases regardless of hiring date.

(2) Promotion Increase (23.13(c))—employees hired January 2, 1991, or before are eligible for this increase.

(3) Minimum Increase (23.13(b))—employees hired June 30, 1991, or before shall receive this increase.

(h) Effective Dates for Salary Increases. Salary increases for DRS employees shall be effective January 1,



1992, except for DRS Supplements which shall be paid over the period during which the activity is assigned.

(i) Order of Salary Increases.

- (1) Salary Equity—23.13(d)
- (2) DRS/County Schedule Equity—23.13(a)
- (3) Minimum Increase—23.13(b)
- (4) Promotion Increase—23.13(c)
- (5) DRS Supplements—23.13(e)

(f) The provisions of Sections 23.4, Salary Equity Study, 23.6 Report to Employees, 23.7, Report to the UFF, and 23.11, Contract and Grant Funded Increases, shall apply to employees in the Developmental Research Schools.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION

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[Caption Omitted]

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ANSWER TO THIRD AMENDED COMPLAINT,  
AFFIRMATIVE DEFENSES AND  
JURY TRIAL DEMAND

Defendant, Florida Board of Regents, by and through its undersigned attorney, files the following Answer, Affirmative Defenses and Jury Trial Demand to Plaintiff's Third Amended Complaint. The paragraphs of Defendant's Answer correspond to the consecutively numbered paragraphs of Plaintiff's Third Amended Complaint.

- 1. Admit.
- 2. Admit.
- 3. Admit.
- 4. Admit.
- 5. Admit.
- 6. Admit.
- 7. Admit.
- 8. Deny.
- 9. Deny.
- 10. Deny.
- 11. Deny.
- 12. Deny.
- 13. Deny.

14. Deny.

15. Deny.

16. Deny.

17. Deny.

18. Deny.

19. Deny.

20. Deny.

21. Deny.

22. Deny.

23. Deny.

24. Deny.

26. Defendant realleges response to paragraphs 1 through 25 above.

27. Deny.

28. Deny.

29. Deny.

*Prayer for Relief*

1. Deny.

2. Deny.

3. Deny.

4. Deny.

5. Deny.

**AFFIRMATIVE DEFENSES**

1. Res Judicata.

2. Collateral Estoppel.

3. Plaintiffs have made claims which are not actionable under the law and as such these are claims upon which relief cannot be granted.

4. Plaintiffs have failed to state any cause of action for which relief can be granted.

5. Plaintiffs have failed to exhaust their administrative remedies.

6. Plaintiffs have failed to fulfill conditions precedent which are required prior to filing their lawsuit.

7. Statutes of Limitations.

8. Business Necessity.

**DEMAND FOR JURY TRIAL**

Defendant demands a trial by jury on all matters so triable by law.

Respectfully submitted,

ROBERT A. BUTTERWORTH  
Attorney General

/s/ Janice L. Jennings  
JANICE L. JENNINGS  
Assistant Attorney General  
Florida Bar No. 0472352  
DEPARTMENT OF LEGAL AFFAIRS  
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Tallahassee, FL 32399-1050  
(904) 488-1573

(Certificate of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION

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[Caption Omitted]

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**PLAINTIFFS' TRIAL BRIEF**

The Plaintiffs in the above-styled matter, J. Daniel Kimel, Jr., et al. (hereinafter referred to as "Plaintiffs") have invoked the jurisdiction of this Court under 29 U.S.C. § 621, *et seq.*, the Age Discrimination in Employment Act (hereinafter referred to as "ADEA" or the "Act"), and 28 U.S.C. § 1331, seeking to recover salary and benefits, and accrued interest thereon, in an amount sufficient to place Plaintiffs in the same position they would have been in had they been awarded salary compression increases in their base pay beyond each year after the 1991-92 fiscal year, liquidated damages, and attorney's fees and costs.

**STATEMENT OF THE CASE AND OF THE FACTS**

The Plaintiffs in this case are current or former faculty and librarians of Florida State University ("FSU") and Florida International University ("FIU") who are all over the age of 40 and have served as members of their respective departments for a longer period of time than other similarly employed individuals. Because the prevailing market rate must be paid to attract more recently hired faculty, who tend to be younger than Plaintiffs, the difference between the salaries of the newly hired employed and longer term employees widens, resulting in a

phenomenon called salary compression. In essence, the market value of Plaintiffs' services does not keep pace with the prevailing market rate which continues to rise as higher salaries are paid to new hires.

The problems resulting from salary compression were recognized and a provision in the collective bargaining agreement between Defendant and United Faculty of Florida provided for a salary increase for faculty and librarians identified to be suffering from this problem. However, during the 1991-92 fiscal year the Florida Legislature rescinded the funding that would have covered the market increases, which were challenged in a lawsuit filed by United Faculty of Florida. The litigation of this issue did not conclude until 1993 and the Legislature failed to appropriate sufficient funds to pay the market equity increases in the 1992-93 budget, although the increases were originally intended to be included in Plaintiffs' base pay beginning in the 1991-92 fiscal year. United Faculty of Florida prevailed in the lawsuit and Plaintiffs were awarded six months of the increase retroactive to the 1991-92 year. No funds were subsequently appropriated to restore fully the 1991-92 salary compression increases or the increases that should have been awarded during the 1992-93 fiscal year.

However, sufficient funds were provided in the 1993-94, 1994-95 and 1995-96 budgets for salary increases to be distributed at the discretion of Defendant to restore eligible faculty and librarians' salaries, including Plaintiffs, and would have placed Plaintiffs in the position they would have been in had the 1991-92 salary compression increases been continued in their base pay.

Despite the provision of sufficient funds from Defendant to the nine universities in the State University System to award market pay increases, the management at FSU and



FIU decided not to use the available discretionary funds to restore the salary compression increases of Plaintiffs and other similarly situated individuals. The decision not to restore the increases has had a statistically disproportionate impact upon employees such as Plaintiffs who are over 40 years of age and have contributed the most years of service to their universities. Plaintiffs challenge this decision not to restore the salary compression increases as violative of Section 623(a)(1) of the ADEA.

### ARGUMENT I

#### PLAINTIFFS' DISPARATE IMPACT CLAIM FOR FAILURE TO AWARD MARKET EQUITY PAY INCREASES

In cases brought under the ADEA it is the burden of the Plaintiffs to prove that age was a determinative factor in the adverse action taken by the employer. *Verbraeken v. Westinghouse Electric Corp.*, 881 F.2d 1041, 1045 (11th Cir. 1989). Such proof may be made either by direct evidence of discriminatory intent, or, by offering statistical evidence of discrimination or circumstantial evidence from which the finder of fact may infer discriminatory intent. *Verbraeken*, 881 F.2d at 1045; *MacPherson v. University of Montevallo*, 922 F.2d 766, 770-71 (11th Cir. 1991). The statistical evidence is proven under the "disparate impact" theory and can be used to establish that a facially neutral employment practice, not justified by a legitimate business reason, has a disproportionately adverse impact on the members of a protected group (here, individuals over the age of 40). *MacPherson*, 922 F.2d at 771; *Hazelwood School District v. United States*, 433 U.S. 299, 306-09, 97 S.Ct. 2736, 2740-42 (1977). Discriminatory intent need not be proven by the Plaintiffs in a disparate impact case. *Allison v. Western Union Telegraph*

*Company*, 680 F.2d 1318, 1322 (11th Cir. 1982); *Lester v. Ollin Corp.*, 50 F.E.P. Cases (BNA) 1468 (N.D. Fla. 1989).

To make out a *prima facie* case of disparate impact discrimination, a complaining party must prove, by a preponderance of the evidence, that a specific employment practice substantially and adversely impact upon a protected group to which the complaining party belongs. *Griggs v. Duke Power Company*, 401 U.S. 424, 91 S.Ct. 849 (1971). In determining whether the employment practice at issue has resulted in a disparate impact, both objective and subjective employment criteria utilized by the employer may be considered. *Watson v. Ft. Worth Bank and Trust*, 108 S.Ct. 2777, 2786 (1988).

If the disparate impact is proved, again through the use of statistical evidence, the burden then shifts to the employer to prove that the employment practice was "job related" and prompted by business necessity."<sup>1</sup> In order to prove job relatedness and business necessity, the Defendant bears the burden of showing that its decision or practice is necessary to the operation of its business and

<sup>1</sup> It should be noted that the Civil Rights Act of 1991 overruled the Supreme Court's decision in *Wards Cove Packing Company v. Atonio*, 490 U.S. 642, 109 S.Ct. 2115 (1989), with regard to the Defendant's burden in proving job relatedness and business necessity. Congressional intent in this regard was to undo the harsh result against Plaintiffs brought about by the *Wards Cove* decision. See 42 U.S.C. § 1981 note. In so doing, Congress codified the disparate impact methods of proof enunciated by the Court in its earlier decision of *Griggs*, and is codified at 42 U.S.C. § 2000e-2(k). While this provision of the Civil Rights Act of 1991 expressly amends the disparate impact proof provision of Title VII of the Civil Rights Act of 1964, it is clearly intended to apply to anti-discrimination laws which have been modeled after and interpreted consistently with Title VII, including the ADEA. *H Rept No 120-40*, Part II, 5/17/91, p. 4. Thus, the *Griggs* analysis regarding the respective burdens in a disparate impact case now controls.

is related to successful performance of the job for which the practice is used. *Griggs*, 401 U.S. at 424, 91 S.Ct. at 854.<sup>2</sup>

Should a Defendant be successful in meeting its burden, the complaining party must be given an opportunity to show that other employment practices which would have had a lesser impact and effect would have served the employer's legitimate interest in competent performance of the job. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425, 95 S.Ct. 2362, 2375 (1975).

Plaintiffs will establish their *prima facie* case through the use of expert testimony showing that the disparate impact in refusing to provide the market equity payment was statistically significant enough to meet Plaintiffs' initial burden. Evidence will be provided showing that while the traditional benchmark in demonstrating disparate impact for older workers suggests acceptable probabilities of one in twenty (two standard deviations) or one in one hundred (three standard deviations), as acceptable demonstrations that a protected group has been impacted more severely by a seemingly neutral business decision, the probabilities in the instant case are that of one in ten thousand.

Additionally, without conceding that Defendant will meet its burden of showing that the decision not to award the market equity increases was job related and necessary to the operation of its business (indeed, Plaintiffs will attempt to show that it was not), Plaintiffs will have no difficulty

<sup>2</sup> Plaintiffs' statistical *prima facie* case must bear out at least a "marked disproportion," which is less than a "gross disparity." *Griggs*, 401 U.S. at 429, 91 S. Ct. at 852. Most courts have held that the *prima facie* case through statistics is met where the statistics exhibit a disparity of at least two standard deviations. *Rivera v. City of Wichita Falls*, 665 F.2d 531, 545, fn. 22 (5th Cir. 1982). This is often referred to as the "two standard deviation rule."

in showing that alternative methods were available to FSU and FIU to provide the market equity payments from the large pool of discretionary salary funds at both universities' disposal. Specifically, Plaintiffs will provide evidence showing that there were more than enough discretionary funds available to lessen the impact upon Defendant, either by providing the entire increase due each Plaintiff or a partial payment over time, to undo the compression problem.

## ARGUMENT II

### RELIEF AVAILABLE TO PLAINTIFFS FOR ADEA VIOLATION

Like Title VII, "the purpose of the ADEA is to make persons whole." *Gibson v. Mohawk Rubber*, 692 F.2d 1093, 1097 (8th Cir. 1982). Toward this end, prevailing Plaintiffs are entitled to more than simply back pay (see 29 U.S.C. § 626(b)) but should be "restored to a position where they would have been were it not for the unlawful discrimination." *Firefighters Local 1784 v. Stotts*, 467 U.S. 561, 104 S.Ct. 2576 (1984) (describing "make-whole" remedial power in Title VII cases).<sup>3</sup>

Plaintiffs have brought this claim for, and are entitled to an award of back pay and fringe benefits in order to make them whole. Such is clear provided for in the Act itself. See 29 U.S.C. § 626(b). In addition, Plaintiffs may truly be made whole only if Defendant is ordered to permanently restore the market equity to Plaintiffs' base pay as was originally intended. Indeed, in order to truly remedy the compression problem suffered by Plaintiffs, this Court

<sup>3</sup> Although the ADEA incorporates the remedial provisions of the Fair Labor Standards Act, it is clear that 29 U.S.C. § 626(b) provides for expanded remedies in ADEA cases. In this regard, the "make-whole" remedial purpose of the ADEA is similar to that of Title VII.



must order Defendant to bring Plaintiffs' salary up to the point where their compensation is more in line with their market value. Such is clearly within this Court's discretion and is part and partial of the "make whole purpose of the Act."<sup>4</sup>

### ARGUMENT III

#### PLAINTIFFS' ENTITLEMENT TO LIQUIDATED DAMAGES

Where a wilful violation of the ADEA is shown, a Defendant may be ordered to pay liquidated damages of double the back pay award. 29 U.S.C. § 626(b). In addition, the fringe benefits associated with the back pay owed may also be doubled by a liquidated damages award. *Kossman v. Calumet County*, 849 F.2d 1027 (7th Cir. 1988). To prove entitlement to liquidated damages, wilfulness must be shown as an employer knowing, or showing reckless disregard for whether its conduct violated the ADEA. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 126, 105 S.Ct. 613, 625 (1985).

Plaintiffs will provide evidence at the trial in this cause showing that the statistically significant disparate impact resulting from the failure to award the market equity increase falls squarely within the wilfulness standard enunciated by the Court in *Trans World Airlines*. It will be shown that because of Defendant's previous recognition of the salary compression problem by providing for that

<sup>4</sup> It should be noted that some of the Plaintiffs in this action have since retired, for which the permanent adjustment mentioned above would not be applicable. However, as part of this Court's ability to provide lost benefits under the ADEA, an order requiring Defendant to pay into said Plaintiffs' retirement fund that would increase their retirement benefits to reflect the market equity increase is wholly consistent with the purpose of the ADEA and within this Court's power.

relief in the collective bargaining agreement, that as soon as sufficient funds became available (during the 1993-94, 1994-95 and 1995-96 fiscal year), to provide the market equity payments that FSU and FIU's refusal to remedy the problem once it had the means to do so was either a knowing violation of the Act, or at the very least, showed reckless disregard for whether its conduct would disparately impact Plaintiffs in violation of the ADEA. Further evidence will be presented showing that Plaintiffs' collective bargaining representative, United Faculty of Florida, put Defendant on notice of the problem that would result if the market equity increases were not provided at the very time Defendant had the ability to provide the necessary adjustment to Plaintiffs' pay.

### ARGUMENT IV

#### ATTORNEY'S FEES AND COSTS

A prevailing party in an action under the ADEA is entitled to recover reasonable attorney's fees and costs in addition to any judgment awarded for violations of the ADEA pursuant to 29 U.S.C. § 626(b). *Lewis v. Federal Prison Industries, Inc.*, 953 F.2d 1277, 1982 (11th Cir. 1992). The determination of the attorney's fees and costs is the same as that required for other attorney's fees matters, such as the Civil Rights Act of 1964 and the Fair Labor Standards Act.

Should Plaintiffs prevail in this matter, such an award is entirely proper.



### ARGUMENT V

#### THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL ARE NOT APPLICABLE TO THIS ACTION

Defendant has raised the defenses of res judicata and collateral estoppel claiming that the Florida Supreme Court decision in *Chiles v. UFF*, 615 So.2d 671 (Fla. 1993), precludes litigation of Plaintiffs' age discrimination claim before this Court. However, both defenses are wholly inapplicable to the federal law question of whether Defendant's decision to not award the market equity pay increases had a disparate impact upon Plaintiffs in violation of the ADEA.

In testing whether the doctrines of res judicata and collateral estoppel apply to litigation of a federal claim, the issue is whether the state courts would give preclusive effect to the ruling at issue. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 102 S.Ct. 1883 (1982). With respect to the collateral estoppel defense, Florida law on the subject was summarized by the Florida Supreme Court in *Mobil Oil Corporation v. Shevin*, 354 So.2d 372 (Fla. 1978):

Collateral estoppel, or estoppel by judgment, is a judicial doctrine which in general terms prevents *identical parties* from relitigating issues that have previously been decided between them. The essential elements of the doctrine are that the *parties and issues be identical*, and that *the particular matter be fully litigated and determined in a contest which results in a final decision of a court of competent jurisdiction*.

*Shevin*, 354 So.2d at 374 (footnotes omitted).

The test for determining the applicability of res judicata defense was defined as follows:

Several conditions must occur simultaneously if a matter is to be made res judicata: identity of the thing sued for; identity of the cause of action; identity of parties; identity of the quality in the person for or against whom the claim is made . . . It is also a settled rule that when the second suit is between the same parties but based upon a different cause of action from the first, the prior judgment will not serve as an estoppel except as to those issues actually litigated and determined in it.

*Albrecht v. State*, 444 So.2d 8, 12 (Fla. 1984).

Application of the tests espoused in *Shevin* and *Albrecht* clearly dictate that Defendant's assertion of these defenses is misplaced and should be rejected. Simply put, the parties in the *Chiles* litigation Defendant cites as applicable to both defenses were entirely different from the parties in the instant action. In *Chiles*, the United Faculty of Florida brought an action in conjunction with the American Federation of State, County and Municipal Employees, the Florida Police Benevolent Association, and the Federation of Physicians and Dentists, against the Governor in his official capacity.

Additionally, the dispositive issue in *Chiles* was whether the Legislature violated Article I, Sections 6 and 10 of the Florida Constitution in failing to provide pay raises in the face of a budget shortfall. *Chiles*, 615 So.2d at 672. On that issue, the Court held that the Legislature has the authority to reduce previously approved appropriations and not offend state constitutional law principles if it has a compelling state interest in doing so. *Chiles*, 615 So.2d at 673. The issue for resolution in this case is one of age discrimination under the ADEA. The issue

of age discrimination was not (and could not have been) litigated in the *Chiles* case.

Therefore, based on the tests announced in *Shevin* and *Albrecht*, Defendant's defenses of res judicata and collateral estoppel must fail. This Court should not give any credence to Defendant's arguments in support of these defenses.

#### ARGUMENT VI

##### ALL PRE-SUIT CONDITIONS AND LIMITATIONS PERIODS HAVE BEEN SATISFIED

Defendant has raised three defenses regarding pre-suit conditions which it claims have not been met prior to the institution of this lawsuit, all of which have no merit and should be rejected. First, Defendant avers that "the affirmative defense of statute of limitations is applicable given that the Plaintiffs have filed their claim more than 300 days beyond the date they knew or reasonably should have known of the alleged adverse employment action." (Answers to Interrogatories; Defendant's Answer to Third Amended Complaint, p. 3) Second, Defendant states that "the affirmative defense of exhaustion of administrative remedies is applicable given that most or all of the Plaintiffs have failed to avail themselves to the appropriate administrative forums for resolution of this salary claim, including the applicable BOR/UFF collective bargaining agreement." (Answers to Interrogatories; Defendant's Answer to Third Amended Complaint, p. 3) Third, Defendant has generally averred that "Plaintiffs have failed to fulfill conditions precedent which are required prior to filing their lawsuit." (Defendant's Answer to Third Amended Complaint, p. 3)

Regarding Defendant's statute of limitations defense, the 300 day limitations period was clearly met by the

filing of a charge with the Equal Employment Opportunity Commission by Plaintiff Kimel as a representative/class action charge on April 4, 1995. As will be shown at trial, the April 4, 1995, filing by Kimel was within 300 days after the date Defendant's own witness testified at deposition the Defendant notified Plaintiffs in August, 1993, of its decision to not restore the market equity increase. Thus, this defense is not applicable to this action and should be summarily rejected by the Court.

Likewise, Defendant's exhaustion defense should be rejected as well. The only administrative remedy that need be pursued prior to the filing of a federal lawsuit for age discrimination is that of the filing of an administrative charge with the Equal Employment Opportunity Commission and any state deferral agency. As previously noted, Plaintiff Kimel filed the appropriate charge on behalf of himself and others similarly situated, to which the other Plaintiffs have opted-in.<sup>5</sup> The state charges were filed more than sixty days prior to filing suit which satisfied the only other requirement.

There is no other exhaustion requirement applicable to Plaintiffs' lawsuit. Indeed, there is no duty to file a grievance prior to the maintenance of an action under the ADEA. In *Alexander v. Gardner-Denver Company*, 415 U.S. 36, 94 S.Ct. 1011 (1974), the Supreme Court held that in a Title VII<sup>6</sup> action an employee need not first exhaust the grievance-arbitration machinery prior to the maintenance of a federal lawsuit. The Court noted that:

<sup>5</sup> In fact, several Plaintiffs, Burton Altman, Bruce Grindal, J. Daniel Kimel, Jr., and Katherine Shelfer, filed separately with the Florida Commission on Human Relations.

<sup>6</sup> Though decided under Title VII, the *Alexander* rationale is equally applicable to an action under the ADEA, inasmuch as the substantive provisions of the ADEA "were derived in *haec verba* from Title VII." *Lorillard v. Ponds*, 434 U.S. 575, 584, 98 S.Ct. 866 (1978).



We are also unable to accept the proposition that Petitioner waived his cause of action under Title VII. To begin, we think it clear that there can be no prospective waiver of an employee's rights under Title VII. It is true, of course, that a union may waive certain statutory rights related to collective activity, such as the right to strike. . . . These rights are conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for union members. Title VII, on the other hand, stands on plainly different grounds, it concerns not majoritarian processes but an individual's right to equal employment opportunities . . . Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights could defeat the paramount congressional purpose behind Title VII.

*Alexander*, 415 U.S. at 51, 94 S.Ct. at 1021.

Plaintiffs are not unmindful of the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S.Ct. 1647 (1991). However, Plaintiffs submit that *Gilmer* is inapplicable to the circumstances presented in this case.

In *Gilmer*, the Supreme Court announced that arbitration of employment discrimination claims was proper under the ADEA. However, the *Gilmer* decision is only applicable to situations where an employment contract<sup>7</sup>

<sup>7</sup> Also, the *Gilmer* holding applies only to private, individual contracts and does not affect collective bargaining agreements, where the holding of *Alexander* still controls. See *Benstad Interstate/Johnson Lake Corp.*, 752 F.Supp. 1054, 1057 (S.D. Fla. 1990); *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932, 935 (10th Cir. 1992); *Bacashihua v. U.S. Postal Service*, 859 F.2d 402 (6th Cir. 1988).

contains express language waiving the litigation of all federal statutory rights.

Finally, it is not entirely clear what Defendant means in its claim that Plaintiffs failed to fulfill certain conditions precedent to the filing of this action. Plaintiffs can only assume that Defendant is referring to the fact that not all Plaintiffs filed a charge with the EEOC or Florida Commission on Human Relations. However, even if Defendant is making such a claim, it should be rejected by this Court.

It is well-established that the "single-filing" or "piggy backing" rule allows additional Plaintiffs to opt into a class or representative action by latching onto a timely charge filed by one of the named Plaintiffs. As was recently held by the Eleventh Circuit in *Grayson v. K-mart Corp.*, 9 F.L.W. Fed. C1003 (April 9, 1996), the piggy backing rule is applicable to ADEA cases so long as: (1) the relied upon charge to which the other Plaintiffs are utilizing is not invalid; and (2) the individual claims of the filing and non-filing plaintiffs arise out of the same discriminatory treatment in the same time frame. *Grayson*, 9 F.L.W. Fed. at C1007; see also *Mooney v. Aramco Service Co.*, 54 F.3d 1207, 1223 (5th Cir. 1995) (court states that federal courts universally recognize piggy backing rule).

As previously mentioned, Plaintiff Kimel filed his charges with the EEOC and the Florida Commission on Human Relations on his behalf and on behalf of other similarly situated employees of Defendant Board of Regents. Under the *Grayson* holding, such was all that was required for the non-filing Plaintiffs to join in this matter.



## ARGUMENT VII

PLAINTIFFS WERE GIVEN NO OPPORTUNITY  
TO MITIGATE THEIR DAMAGES

Defendant has indicated that it will raise as an issue in this case Plaintiffs' failure to mitigate their back pay damages. Such an argument is futile for two reasons. First, Defendant has not until this late stage in the proceedings indicated its intention to pursue this argument. Indeed, Defendant's Answers do not raise the affirmative defense of mitigation, and Defendant did not put the mitigation defense at issue in discovery. Defendant cannot now raise the defense in the pre-trial documents filed with this Court.

Second, and more importantly, while a Plaintiff in an ADEA case does have a general duty to mitigate back pay and front pay damages, [*Orzel v. City of Wauwatosa Fire Department*, 697 F.2d 743 (7th Cir. 1983) and *EEOC v. Prudential Federal Savings and Loan Association*, 763 F.2d 1166 (10th Cir. 1985)], Plaintiffs could not mitigate their back pay awards in this case because Defendant would not provide the requested market equity pay increases and had no control over Defendant's refusal to provide the same. The only alternative for Plaintiffs was to make a request for the funds, which they did; and then try to force Defendant to provide the funds, which they have by filing this lawsuit.

Furthermore, the mitigation issue usually arises where a termination has occurred, where the Courts have imposed the affirmative duty to mitigate upon Plaintiffs to seek similar work to reduce the amount of damages they may be owed. *See, e.g., Nord v. United States Steel Corp.*, 758 F.2d 1462 (11th Cir. 1985). In the instant case, the Plaintiffs were not terminated, thus rendering futile any mitigation argument put forth by Defendant.

## ARGUMENT VIII

PLAINTIFF DOUGHERTY IS A PROPER  
PARTY TO THIS ACTION

Defendant has also indicated that Plaintiff Dougherty is not a proper party to this action because his claim is barred by the doctrines of res judicata, collateral estoppel and accord and satisfaction. The Defendant claims that as a result of a grievance settlement between Dougherty and Defendant on October 23, 1991, that Dougherty has received all the relief to which he is entitled.

However, Plaintiff Dougherty fails to understand how the October 23, 1991, grievance settlement could possibly have any bearing on this case, since the action complained of in the instant suit (ADEA disparate impact discrimination) occurred some two years after the grievance settlement in the summer of 1993.

The grievance to which Defendant refers allege that:

The University has discriminated against [Dougherty] on account of his handicap and alcoholism and that the University has not provided him with sufficient laboratory space, has not reappointed him as director of the Mass Spectrometry Laboratory, and has not provided him with appropriate salary increases.

The award given Dougherty as a result of the settlement was:

A salary increase of \$7,000.00 effective January 1, 1992. This increase includes all salary increases which are provided pursuant to the BOR/UFF collective bargaining agreement for the academic year 1991-1992, and shall be given without regard to whether legislative increases previously scheduled for January 1, 1992, are withdrawn or provided.

From the aforementioned, it is clear that Plaintiff Dougherty did not, nor could he have, complained of the issues in this suit during the 1991 grievance. The language of the settlement agreement quoted above does not contemplate in any way Dougherty's claim of age discrimination. The issues in the grievance being entirely different from the issues in this case, none of the three defenses Defendant will put forth in order to have Plaintiff Dougherty dismissed from this case are valid.

Respectfully submitted,

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Except for  
Richard E. Glick

(Certificate of Service Omitted in Printing)

[Filed May 9, 1996]

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF FLORIDA  
PENSACOLA DIVISION

Civil Action No: 5:96CV25

WELLINGTON N. DICKSON, a/k/a "Duke",  
*Plaintiff,*

vs.

FLORIDA DEPT. OF CORRECTIONS JACKSON COUNTY,  
JACKSON CORRECTIONAL INSTITUTION, JIM FOLSOM,  
a/k/a JIM FOLSOM SUPERINTENDENT JACKSON COUNTY  
CORRECTIONAL INSTITUTION, JAMES EDWARD CHILDS,  
a/k/a MAJOR J.E. CHILDS,

*Defendants.*

COMPLAINT

COMES NOW the Plaintiff, Wellington N. Dickson, by and through his undersigned attorney and states and alleges as follows:

1. The plaintiff is, and at all times relevant to the actions complained of here has been, a resident of Marianna, County of Jackson, State of Florida, and presently resides at 2302 Hollister Road, Marianna, Florida 32446.

2. The defendant, FLORIDA DEPARTMENT OF CORRECTIONS, JACKSON COUNTY, is a corporation incorporated under the laws of the State of Florida, with their principal place of business in the State of Florida at the city of Tallahassee, and is also licensed to do busi-

ness in the City of Malone, County of Jackson, in the State of Florida.

3. The defendant JACKSON CORRECTIONAL INSTITUTION is a corporation incorporated under the laws of the State of Florida, with their principal place of business in the State of Florida at the city of Malone, County of Jackson, in the State of Florida whose mailing address is PO Box 4900, Malone, Florida 32445.

4. Defendants JIM FOLSOM, a/k/a JIM FOLSOM SUPERINTENDENT JACKSON COUNTY CORRECTIONAL INSTITUTION, JAMES EDWARD CHILDS, a/k/a MAJOR J.E. CHILDS are agents of JACKSON CORRECTIONAL INSTITUTION and are employers as defined in Title 29 U.S.C. §§ 630(b)(1).

5. At all times relevant to the actions complained of here, the defendants were persons in an industry affecting commerce employing 20 or more persons for each working day in each of 20 or more calendar weeks in the current or preceding year thus meeting the definition of "Employer" under Chapter XIV of Title 29 U.S.C. § 630(b).

6. Jurisdiction of this action is brought pursuant to the Civil Rights Act of 1964 (Title 42 U.S.C. § 1981a); the Age Discrimination in Employment Act [Title 29 U.S.C. §§ 621-634]; and the Americans with Disabilities Act of 1990 [Title 42 U.S.C. § 12112(b)(5)(A)] for damages based on the unlawful employment practices committed by defendant(s) and is invoked pursuant to 28 U.S.C. §§ 1331 and 1337, and 29 U.S.C. §§ 216(b), 626(b) and (c); Title 42 U.S.C. §§ 12117(a).

7. On or about October 25, 1994, Plaintiff filed a charge of discrimination with the Florida Commission on Human Relations alleging that he was discriminated against based upon age and handicap, and was assigned case number 95-J046. At approximately the same time

Plaintiff filed a charge with the Equal Employment Commission and was assigned Charge Number 15D950059, thereby satisfying the requirements of Title 42 U.S.C. § 2000e-5(b) and (e); and Title 42 U.S.C. § 12117.

8. Such charge was filed within one hundred and eighty (180) days of the unlawful employment practice. On September 28, 1995, Plaintiff requested a right to sue letter. On or about February 9, 1996, less than 90 days prior to the filing of this complaint, the Equal Opportunity Commission issued to Plaintiff a notice of Right to Sue with respect to such charge of discrimination on the basis of age and handicap.

9. The incidents described below were part of a continuing series of incidents of discrimination and harassment which began on or about May 1991 to the present and which constitute a continuing violation of the Plaintiff's Title VII rights civil rights under Section 1981a et seq., and Chapter 126 rights protected under Title 42 United States Code.

#### GENERAL ALLEGATIONS

10. Plaintiff reincorporates by reference each and every allegation in paragraphs 1 through 9 above.

11. On or about December of 1986, Plaintiff graduated as a certified corrections officer from Washington Holmes Vo-Tech School in Chipley, Florida. Also, Plaintiff applied for, and was given a position as a corrections officer at Apalachee Corrections Institution [hereinafter ACI] in Sneads, Florida, in December of 1986.

12. Promotions at ACI were few and far between for older Northerners, and Plaintiff felt the chance for promotions might be more favorable elsewhere. On or about October of 1990, Plaintiff found out that there was going



to be a new state corrections facility built in Malone, Florida, and that it was to be named Jackson Correctional Institution. Plaintiff called and spoke to Defendant Major Childs about obtaining a position at the new corrections facility Jackson Correctional Institution, [hereinafter JCI]. Major Childs informed Plaintiff that he was indeed hiring personnel, and told Plaintiff to come fill out an application, and go through the interview process if he wanted a job.

13. Plaintiff, Lee Blaylock, who was a fellow corrections officer at ACI, and Curly Pittman, also working at ACI, went to see Major Childs, and each applied for jobs. During the interview process, Major Childs responded, when asked about promotions, that based on Plaintiff's and his co-applicants' qualifications that he foresaw each of them being promoted to Class Title Correctional Officer Sergeant within 6 months to a year.

14. Plaintiff was accepted for and was hired as a corrections officer at JCI on December 14, 1990. Plaintiff has construction experience and assisted in the building phase of JCI. Plaintiff was one of 23 corrections officers hired to build the corrections facility in Malone, Florida.

15. On or about May 1991 and September 1991, the Plaintiff learned that certain Sergeant's positions within the organization at Jackson Correctional Institution were opening up for promotion. On or about July 1, 1991, on the midnight shift, Plaintiff was working both inside and outside patrol, carrying much of the patrol load himself. At around July 1, 1991 at 5:30 a.m., Plaintiff began experiencing a shortness of breath, cold sweats, tightness in his chest, and having a difficult time breathing. Plaintiff reported this to his supervisor Lt. Marvin Pilcher, stating that he did not feel good, and describing his other symptoms. Lt. Pilcher then requested that Plaintiff go and sit

in the gate house and count the inmates as they passed through for chow. Plaintiff did so until 7:00 a.m., when his shift ended. Plaintiff went home, told his wife that he didn't feel good, had another chest pain, and shortness of breath, and was promptly taken to a hospital.

16. At around noon, Plaintiff's wife went back home and called Major Childs to inform him that Plaintiff had a mild heart attack, was at the hospital, and would not be coming in for his next shift on doctor's orders. Plaintiff's wife specifically asked Major Childs to inform Plaintiff's supervisor so that she would not be called when she was trying to sleep in the early hours of the morning when Plaintiff did not show up for his scheduled shift. Plaintiff's wife was called anyway when Plaintiff didn't show up for his shift, because the message was not relayed. She told the caller that Major Childs must not be very good at running the prison, if he couldn't relay a simple message. Major Childs told Plaintiff when he later returned to work that he had heard about her comment. Childs opined to Plaintiff that, "I have heard that your wife doesn't think that I am very competent." Plaintiff responded that "Under the circumstances, I cannot blame her." From that point on, Plaintiff believes he was singled out for harassment and denial of promotions by Defendant Childs, because Defendant Childs had no power over Plaintiff's wife for her candid comments about him.

17. Plaintiff was in all ways qualified for the Sergeant positions, and was desirous of being promoted into one of the 4 or 5 vacant positions. On or about September 20, 1991, Plaintiff met with Major Childs and asked why he did not promote Plaintiff and discussed future opportunities within the company and was at that time advised that there were two younger people seeking positions within the company and that the company needed to promote

those persons to avoid the risk of those persons leaving the company.

18. On or about September 30, 1991, two Corrections Officer Sergeants positions within Jackson Correctional Institution were filled by Kipp Williams and Michael Baxter. Plaintiff was apparently not considered for those positions so that the positions could be filled by younger selectees. Kipp Williams and Kenneht Baxter, both younger and lesser experienced were promoted. Plaintiff inquired as to why he again had been passed over, and was told by Major Childs that: "You don't have enough bricks in your pocket." Plaintiff took the statement to mean that Plaintiff had not performed enough personal favors for Major Childs as did Baxter and Williams. They ran errands, and acted as Major Childs' valet. Kipp Williams' wife worked in the personnel office.

19. Written Guidelines have been promulgated for use in bestowing promotions to each job title, such as Correctional Officer Sergeant, Lieutenant, Captain, etc. . . . Some of the factors include: education, performance appraisals, work experience, work history. The policy also states that affirmative action goals will be given consideration. In order to be considered for advancement, a selectee must submit an application once a year to have a current request for promotion before the promotions board at Jackson Correctional Institution. The application for advancement is good, once submitted, from May to June for one year. At all times relevant herein Plaintiff has always had a timely application for promotion submitted for consideration. The usual procedures of the promotion review committee were circumvented by the Defendants in order to allow for persons of a younger age to be promoted within the company and to discriminate against Plaintiff because of his age and disability.

20. Plaintiff was more qualified for the positions than those younger persons selected for promotion. At the

time the Plaintiff was not selected for the position in this instance, he was over the age of 58 a member of a protected class.

21. The younger more inexperienced electees in this instance were: Kipp Williams and Michael Baxter.

22. On or about February of 1992, the Plaintiff learned that Four or Five (4-5) certain Sergeant's positions within the organization at Jackson Correctional Institution were opening up for promotion.

23. Plaintiff was in all ways qualified for the Sergeant positions, and was desirous of being promoted into one of the Four or Five (4-5) vacant positions.

24. On or about February 20, 1992, Plaintiff met with Major Childs to discuss future opportunities within the corrections department [hereinafter company], and was at that time advised that there were younger people seeking positions within the company and that the company needed to promote those persons to avoid the risk of those persons leaving the company. Curly Pittmann, was one of the persons selected for a sergeant position, was younger and who had no college educational experience, and Plaintiff had about more Career Development courses (CD's) than Pittman.

25. On or about the end of February, 1992, the Four or Five (4-5) Corrections Officer Sergeant's positions within Jackson Correctional Institution were filled by younger less qualified selectees. Plaintiff was apparently not considered for those positions so that the positions could be filled by younger less qualified selectees.

26. Plaintiff was more qualified for the positions than those younger persons selected for promotion. At the time the Plaintiff was not selected for the open positions he



was over the age of 59 and was a member of a protected class.

27. In June 1992, Plaintiff resubmitted his yearly application for advancement for the following year. In June, 1992, there were Three (3) more CO Sergeants positions available. Plaintiff was never even allowed to interview for these positions. Danny Brock, with only one-and-a-half (1½) years experience received one of the CO Sergeants positions which was in Food Service. The other selectee promoted was John Stockton, who had two (2) years less experience than Plaintiff.

28. On or about June 1992, Plaintiff learned of three (3) Corrections Officer Sergeant's (hereinafter CO Sergeant's) positions open for advancement at Jackson County Correctional Institution.

29. On or about September of 1992, Plaintiff learned of four or five (4-5) CO Sergeants positions. Plaintiff was interviewed with selectees Corrections Officer [hereinafter CO] Messer, CO Lee Blaylock, who Plaintiff had transferred from ACI to Jackson Correctional Institution with, and CO Patsy Pope. Each of these individuals were younger and less qualified than Plaintiff, who was not promoted.

30. On or about August of 1993, after putting in an application for advancement in June of 1993, there were three (3) more CO Sergeants positions open. CO Gary Dean, and CO Terri Clarke who had been Colonel Childs' secretary were promoted along with CO Creel. Also, at the same time frame, in October of 1993, Plaintiff began re-experiencing the symptoms he had in 1991 during his heart attack. Plaintiff went to his Doctors, who, after an examination, later cleared him for limited duty. Plaintiff's doctor specifically gave orders that there should be no

climbing of towers. Major Childs told Plaintiff that he could climb towers or go home. No accommodation was given and Plaintiff lost income despite being available and willing to work.

31. Plaintiff was not considered, although desirous of a promotion, and each of the selectees were younger and less experienced. The factors for promotion were ignored in order to promote younger less experienced selectees.

32. In February of 1994, Plaintiff learned that seven (7) CO Sergeants positions had become vacant. Plaintiff was not considered for any of these positions so that younger less experienced selectees could be promoted. CO Michael May, who cooks for Colonel Child at his restaurant, received one of the positions. CO Alma Sequine, CO Myra Granger, CO V. Richardson, CO Beachum, and CO Mckinney, who is Colonel Child's cousin, were promoted.

33. In April of 1994, there were two or three (2-3) positions open for CO Sergeant. One went to CO Jerry Hicks, and was again younger and less experienced than Plaintiff.

34. In or about July 15, 1994, there were two positions for CO Sergeant open (Position number 24620 & 24733). Plaintiff was told that he was to get one of these positions. However, after the Lieutenant promotions on July 14, 1994, it was stated that Dickson [plaintiff] and CO T. Harris were to be promoted on July 15, 1994, and Major, now Colonel Childs said: "Not Dickson, he will not be promoted." Mr. Boyd, the Personnel Manager at Jackson Correctional Institution, at that time stated, "You can not justify that because Dickson was on top of the list for promotion." Plaintiff was not promoted.



35. In September, 1994, there were Three (3) positions open for CO Sergeant. Two of these went to CO Brown and CO O. Hearn. In October of 1994, two or three (2-3) CO Sergeants positions opened up and CO Toni Holmes, who had very little experience, and CO Ms. Pollock were given those positions. Plaintiff went to Colonel Childs to inquire why he was not promoted and was told that, "You don't have enough Career Development Courses [hereinafter CD's]." This was not true, because Plaintiff had many more CD's than either of the selectees promoted in September, and before.

36. On September 13, 1994, Plaintiff filed a grievance about the matter of promotions, and failure to accommodate Plaintiff's disability. The Police Benevolence Association (PBA) held a hearing and determined that the promotions process should be reconducted and Plaintiff given the next available CO Sergeant position.

37. In or about October 25, 1994, Plaintiff filed a grievance with the Florida Commission on Human Relations, and the Equal Employment Opportunities Commission, and the Police Benevolent Association (PBA), Plaintiff's union, claiming age discrimination, and disability discrimination in failing to promote & failing to accommodate Plaintiff's disability.

38. In or about mid-November, 1994, Plaintiff took the letters from his heart specialist and family doctor to his supervisors at Jackson Correctional Institution stating that he could come back to work, but could not climb the 60' towers surrounding the prison, nor could Plaintiff perform heavy construction work. Plaintiff was told that unless he could perform the task of climbing the 60'

towers, Major Childs was not allowing Plaintiff to come back to work in any capacity.

39. Plaintiff asked his personnel manager and others at Jackson Correctional Institution: "I thought that under the Americans with Disabilities Act of 1990, that you have to make some accommodation to those with disabilities." No response was given at that time. Plaintiff was physically able to do every listed job required of a corrections officer, except climb the 60' towers. Dr. Ready, Plaintiff's doctor, reviewed each task required of a corrections officer and found that Plaintiff could perform every one of the listed duties, except climbing 60' towers and heavy construction.

40. Defendants refused to accept the Doctor's findings or letters and let Plaintiff come back to work. In or about November of 1994, when Defendants would not let Plaintiff return to work, Plaintiff notified Hal Johnson, an officer of the PBA, who went to work on helping Plaintiff obtain a disability accommodation pursuant to the Americans with Disabilities Act of 1990.

41. Hal Johnson contacted Laura Levy staff counsel for the Department of Corrections in Tallahassee who implied that the Americans with Disabilities Act did not apply to the Department of Corrections. After many hours of working with Defendant Jackson Correctional Institution, in an effort to allow Plaintiff to come back to work, Defendant finally agreed to allow Plaintiff come back to work. Plaintiff's absence from work was an extreme financial hardship.

42. During this time frame, Plaintiff used up his sick leave, annual leave, and compensatory leave. Plaintiff believes that he should have been placed on Administrative

leave since it was the Defendants who refused to allow an accommodation or to let Plaintiff return to work. Plaintiff upon reasonable belief feels that this was harassment against him to get even with his wife for having cast aspersions on Defendant Childs' leadership ability, and for filing complaints against Defendants.

43. Plaintiff returned to work in January of 1994. During 1994 there were four or five opportunities for promotion to CO Sergeant. Plaintiff interviewed each time but was passed over by younger less experienced electees each time. Mr. Boyd, the personnel manager kept telling Plaintiff to keep at it because he was right at the top of the list for promotion, and that they will give it to Plaintiff sooner or later.

#### RETALIATION/HARASSMENT FOR FILING GRIEVANCE FOR CONTINUED FAILURE TO PROMOTE

44. On or about January 15, 1995, the following Four (4) positions became available for CO Sergeant: 29377, 29376, 29375, 29374. Plaintiff was discriminated against on the basis of his age when Defendant Jackson Correctional Institution promoted CO Ronald Edenfield (5½ years experience), CO David Rabon (4 years experience), CO Abner Bowen (4 years experience), and CO Ronald Speets (6 years experience). In retaliation for having filed a grievance, Defendants Folsom and Childs did not bother to even consider Plaintiff for promotion, and promoted the aforementioned younger and less qualified selectees.

45. On or about February 15, 1995, Four CO Sergeant positions, 24717, 24623, 24674, 24675, became available. Plaintiff continued to follow all procedures for advancement, and was desirous of being promoted. Plaintiff was

not considered for these positions and was passed over for younger less qualified selectees: COs Toni Holmes, (3 years experience), Ms. Pollack (3 years experience), Mr. Foshey (5½ years), Mrs. Lawrence (8½ years).

46. On June 1, 1995, three CO Sergeant positions, 24719, 24661, 24658 became available. Plaintiff applied, was not considered, and was passed over for promotion so that younger less experienced selectees could be promoted so that they would not leave the corrections field. CO's Paramore, Kreese, and Butler received the CO Sergeant positions in retaliation for Plaintiff's having filed a grievance.

47. On September 1, 1995 Two (2) CO Sergeant positions, 24690, 24674, opened for filling. In retaliation for having filed a grievance, Plaintiff was passed over again for promotion for younger and less qualified selectees.

48. On October 1, 1995, CO Sergeant positions 33416, 33417 opened for filling. In retaliation for having filed a grievance, Plaintiff was again passed over by less qualified and younger selectees. Plaintiff was 62 years old at this time and was passed over for people under 40, so that they would not leave the corrections department. On October 18, 1995, Plaintiff was informed that COs Pat Edge and L. Powe were given the two available CO Sergeant's positions.

49. On or about March 15, 1996, CO Sergeant positions 24657, and 29377 became vacant. Plaintiff was desirous of being promoted, was qualified for promotion, but was denied and/or not considered so that younger less experienced selectees would not leave the corrections department. In retaliation for having filed a grievance, Defendants promoted Doris Michelle Porter (a black female with 4½ years experience and few CD's) and



Kenry Smith (white male with five (5) years experience and little or no CDs). Ms. Porter's mother was and still is a Jackson Correctional Institution nurse.

### COUNT I

#### FAILURE TO PROMOTE BECAUSE OF AGE IN VIOLATION OF 29 U.S.C.S. §§ 621 ET SEQ.

50. Plaintiff readopts and realleges by reference the allegations found in ¶¶ 1-49, as though set forth in full herein. In or about July 15, 1994, there were two positions for CO Sergeant open (Position number 24620 & 24733). Plaintiff was told that he was to get one of these positions. Plaintiff had been promised by Major Childs to a promotion to CO Sergeant within six (6) months to one (1) year after coming to work at Jackson Correctional Institution.

51. Plaintiff was a member of a protected class, and told by Hinton Banks, personnel manager, that he was going to get one of these positions. Plaintiff was in all ways qualified for the positions, and was desirous of being promoted into one of the vacant positions. About half the time Plaintiff was scheduled to work from September of 1992 to this time, Plaintiff was required to perform the same duties as a CO Sergeant, but without the pay.

52. Written Guidelines have been promulgated for use in bestowing promotions to each job title, such as Correctional Officer Sergeant, Lieutenant, Captain, etc. . . Some of the factors include: education, performance appraisals, work experience, and work history. The policy also states affirmative action goals will be given consideration. The usual procedures of the promotion review committee were circumvented by the Defendants Florida Department of Corrections Jackson County, Jackson Correctional Institute, Jim Folsom, and Major J. E. Childs in order to

allow for persons of a younger age to be promoted within the company.

53. Plaintiff was more qualified for the positions than those younger persons selected for promotion. At the time the Plaintiff was not selected for the position he was over the age of 61.

54. The younger more inexperienced selectee in this instance was CO T. Harris.

Plaintiff demands a jury trial on all issues so triable.

WHEREFORE, Plaintiff respectfully prays that this court:

1. Issue an order enjoining Florida Department of Corrections Jackson County, Jackson Correctional Institution, Jim Folsom, a/k/a Jim Folsom Superintendent Jackson County Correctional Institution, and James Edward Childs, a/k/a Major J.E. Childs, a/k/a Colonel Childs to cease and desist from the conduct described in this complaint, and from harassing or discriminating against Plaintiff in any manner whatsoever.

2. Issue an order requiring Florida Department of Corrections Jackson County, Jackson Correctional Institution to implement meaningful measures to ensure that the conduct of which has occurred in this case does not happen again.

3. Order the promotion of Plaintiff to Lieutenant as of the above date and with all benefits he would have if he had not suffered adverse employment action attributable to age discrimination, or award Plaintiff front pay in the amount of \$144,000.00 if promotion is determined at trial to be impractical.

4. Award Plaintiff back pay, including overtime pay, pension benefits, and other employment benefits which would have accrued if Plaintiff's promotion had not un-



lawfully been withheld as determined by this court after a hearing.

5. Award Plaintiff compensatory damages for his emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life in the amount of \$140,000.00 pursuant to Title 42 U.S.C. 1981a et seq.

6. Award Plaintiff punitive damages in the amount of \$160,000.00 pursuant to Title 42 U.S.C. 1981a et seq.

7. Award Plaintiff attorney's fees, including expert witness fees, pursuant to 42 U.S.C. 2000e-5(k).

8. Award Plaintiff costs, interest, and such other relief as this Court may deem proper.

## COUNT II

### FAILURE TO PROMOTE BECAUSE OF AGE IN VIOLATION OF 29 U.S.C.S. §§ 621 ET SEQ.

55. Plaintiff realleges by reference all allegations in ¶¶ 1-49, and ¶¶ 50-54 as though set forth in full herein. On or about September 1, 1994, the Plaintiff learned that three (3) certain Sergeant's positions within the organization at Jackson Correctional Institution were opening up for promotion.

56. Plaintiff was in all ways qualified for the positions, and was desirous of being promoted into one of the three vacant positions, and reasonably believed that Defendant Childs would live up to his promise to promote Plaintiff to CO Sergeant.

57. On or about September 5, 1994, Plaintiff met with Major Childs and the promotions Board to interview for promotion to one of the three vacancies and to discuss future opportunities within the company and was at that time advised that there were three younger people seeking

positions within the company and that the company needed to promote those persons to avoid the risk of those persons leaving the company. Plaintiff was advised that he needed to obtain a few more Career Development courses (CD's). Plaintiff had taken CD courses and now had 11.

58. Throughout this time frame, Plaintiff was performing the duties associated with a Sergeant's position at least half of the time he worked, without Sergeant's pay.

59. On or about September 9, 1994 the three CO Sergeants positions within Jackson Correctional Institution were filled. Plaintiff was apparently not considered for those positions so that the positions could be filled by younger selectees.

60. Plaintiff timely filed a grievance. Plaintiff has performed all prerequisites and conditions precedent to filing this suit.

WHEREFORE, Plaintiff respectfully prays that this court:

1. Issue an order enjoining Florida Department of Corrections Jackson County, Jackson Correctional Institution, Jim Folsom, a/k/a Jim Folsom Superintendent Jackson County Correctional Institution, and James Edward Childs, a/k/a Major J.E. Childs, a/k/a Colonel Childs to cease and desist from the conduct described in this complaint, and from harassing or discriminating against Plaintiff in any manner whatsoever.

2. Issue an order requiring Florida Department of Corrections Jackson County, Jackson Correctional Institution to institute meaningful procedure to prevent future similar conduct.

3. Order the promotion of Plaintiff to Lieutenant as of the above date and with all benefits he would have if he had not suffered adverse employment action attribu-

table to age discrimination, or award Plaintiff front pay in the amount of \$144,000.00 if promotion is determined at trial to be impractical.

4. Award Plaintiff back pay, including overtime pay, pension benefits, and other employment benefits which would have accrued if Plaintiff's promotion had not unlawfully been withheld as determined by this court after a hearing.

5. Award Plaintiff compensatory damages for his emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life in the amount of \$140,000.00 pursuant to Title 42 U.S.C. 1981a et seq.

6. Award Plaintiff punitive damages in the amount of \$160,000.00 pursuant to Title 42 U.S.C. 1981a et seq.

7. Award Plaintiff attorney's fees, including expert witness fees, pursuant to 42 U.S.C. 2000e-5(k).

8. Award Plaintiff costs, interest, and such other relief as this Court may deem proper.

Plaintiff demands a jury trial on the above issues.

### COUNT III

#### FAILURE TO PROMOTE BECAUSE OF AGE IN VIOLATION OF 29 U.S.C.S. §§ 621 ET SEQ.

61. Plaintiff readopts and realleges by reference all allegations in ¶¶ 1 through 60 above. On or about October 1, 1994, the Plaintiff learned that certain Sergeant's positions within the organization at Jackson Correctional Institution were opening up for promotion.

62. Plaintiff was a member of a protected class at age 61, and was passed over for promotion so that the selectees listed in ¶ 35, who are not members of Plaintiff's protected class, could be promoted because they were

younger and less experienced to keep them from leaving the corrections department.

63. Plaintiff was still performing duties that are normally performed by CO Sergeants at least half or more of all work shifts scheduled by the defendants. This assignment requires Plaintiff to perform Sergeant's duties without Sergeant's pay.

64. During November, 1994 when Plaintiff returned to work after his second heart attack, the defendants shorted Plaintiff's pay twice, causing Plaintiff to have to borrow money to meet his obligations such as his house payment. Plaintiff was forced to wait for his back pay and when it was finally remitted it was done in such a way as to be taxed at a higher rate causing Plaintiff further loss of income. Plaintiff reasonably feels that this was further retaliation for his having filed a grievance over defendant's age discrimination in promoting.

65. Plaintiff was in all ways qualified for the positions of CO Sergeant, and was desirous of being promoted into one of the two or three vacant positions.

66. On or about October 15, 1994 positions within Jackson Correctional Institution were filled as set forth in ¶ 32. Plaintiff was apparently not considered for those positions so that the positions could be filled by younger selectees.

67. The usual procedures of the promotion review committee were circumvented by the Defendants in order to allow for persons of a younger age to be promoted within the company.

68. Plaintiff was more qualified for the positions than those younger persons selected for promotion. At the time the Plaintiff was not selected for the position he was over the age of 61.



69. The younger more inexperienced selectees in this instance were: CO Brown, and CO O. Hearn. Plaintiff has performed all conditions precedent to bringing suit.

WHEREFORE, Plaintiff respectfully prays that this court:

1. Issue an order enjoining Florida Department of Corrections Jackson County, Jackson Correctional Institution, Jim Folsom, a/k/a Jim Folsom Superintendent Jackson County Correctional Institution, and James Edward Childs, a/k/a Major J.E. Childs, a/k/a Colonel Childs to cease and desist from the conduct described in this complaint, and from harassing or discriminating against Plaintiff in any manner whatsoever.

2. Issue an order requiring Florida Department of Corrections Jackson County, Jackson Correctional Institution to institute meaningful procedures designed to prevent future similar conduct.

3. Order the promotion of Plaintiff to Lieutenant as of the above date and with all benefits he would have if he had not suffered adverse employment action attributable to age discrimination, or award Plaintiff front pay in the amount of \$144,000.00 if promotion is determined at trial to be impractical.

4. Award Plaintiff back pay, including overtime pay, pension benefits, and other employment benefits which would have accrued if Plaintiff's promotion had not unlawfully been withheld as determined by this court after a hearing.

5. Award Plaintiff compensatory damages for his emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life in the amount of \$140,000.00 pursuant to Title 42 U.S.C. 1981a et seq.

6. Award Plaintiff punitive damages in the amount of \$160,000.00 pursuant to Title 42 U.S.C. 1981a et seq.

7. Award Plaintiff attorney's fees, including expert witness fees, pursuant to 42 U.S.C. 2000e-5(k).

8. Award Plaintiff costs, interest, and such other relief as this Court may deem proper.

Plaintiff demands a jury trial on all issues so triable.

#### COUNT IV

RETALIATION FOR FILING GRIEVANCE  
AGAINST DEFENDANTS BECAUSE OF AGE  
DISCRIMINATION FAILURE TO PROMOTE,  
SHORTAGE OF PAY, FAILURE TO  
ACCOMMODATE A DISABILITY WHICH WOULD  
NOT ADVERSELY AFFECT THE OPERATION  
OF THE INSTITUTION RESULTING IN LOSS  
OF PAY IN VIOLATION OF 29 U.S.C.S. §§ 623(d)  
AND TITLE 42 U.S.C. § 12112(5)(A)

70. Plaintiff readopts and incorporates by reference the allegations in ¶¶ 1 through 69 above as though set out hereinbelow in full.

71. Plaintiff, at all times relevant herein, was in all ways qualified for the position of CO Sergeant, and was desirous of being promoted into one of the vacant positions cited in Count III above.

72. Plaintiff, after having his request for an accommodation due to his heart condition being unjustly refused, was finally allowed to return to work in November of 1994. Plaintiff's union and PBA representative met stiff unjustifiable and unlawful resistance from Defendants Folsom and Childs when they could not provide reasons for not making an accommodation to Plaintiff's disability. After his return to work, the defendants shorted Plaintiff's pay twice shortly before Christmas. Plaintiff's family suffered because there was not enough money for bills much



less Christmas as Plaintiff was shorted about twenty (20) hours pay.

73. Plaintiff went through proper procedure to rectify his pay problem but Defendant Florida Department of Corrections, when contacted, stated that it was Defendant Jackson Correctional Institution's problem, and refused to issue a check for Plaintiff's shorted pay.

74. Plaintiff and his family suffered economic hardship due to the defendants' retaliatory actions. Plaintiff was still forced to perform CO Sergeant's duties for Correctional Officers pay. Plaintiff worked hard to meet duties expected and performed beyond what was required. All of the above acts violate § 623(d) and Title 42 U.S.C. § 12112(5)(A).

75. All of the above acts by defendants, were the direct and indirect result of Defendant Florida Department of Corrections (FDC), and Jackson Correctional Institution's (JCI) failure to train and supervise Defendants Folsom and Childs. Knowledge of the unlawful behavior must be imputed to FDC and JCI due to the length of time the unlawful conduct took place, as well as learning of it through hearings conducted by Joe Cash of the Florida Commission on Human Relations.

WHEREFORE, Plaintiff respectfully asks that this court:

1. Issue an order enjoining Florida Department of Corrections Jackson County, Jackson Correctional Institution, Jim Folsom, a/k/a Jim Folsom Superintendent Jackson County Correctional Institution, and James Edward Childs, a/k/a Major J.E. Childs, a/k/a Colonel Childs to cease and desist from the conduct described in this complaint, and from harassing or discriminating against Plaintiff in any manner whatsoever.

2. Issue an order requiring Florida Department of Corrections Jackson County, Jackson Correctional Institu-

tion to institute meaningful procedures to prevent and punish future similar conduct.

3. Order the promotion of Plaintiff to Lieutenant as of the above date and with all benefits he would have if he had not suffered adverse employment action attributable to age discrimination, or award Plaintiff front pay in the amount of \$144,000.00 if promotion is determined at trial to be impractical.

4. Award Plaintiff back pay, including overtime pay, pension benefits, and other employment benefits which would have accrued if Plaintiff's promotion had not unlawfully been withheld as determined by this court after a hearing.

5. Award Plaintiff compensatory damages for his emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life in the amount of \$140,000.00 pursuant to Title 42 U.S.C. 1981a et seq.

6. Award Plaintiff punitive damages in the amount of \$160,000.00 pursuant to Title 42 U.S.C. 1981a et seq.

7. Award Plaintiff attorney's fees, including expert witness fees, pursuant to 42 U.S.C. 2000e-5(k).

8. Award Plaintiff costs, interest, and such other relief as this Court may deem proper.

Plaintiff demands a jury trial on all issues so triable.

## COUNT V

### FAILURE TO PROMOTE BECAUSE OF AGE IN VIOLATION OF 29 U.S.C.S. §§ 621 ET SEQ.

76. Plaintiff readopts and incorporates by reference the allegations in ¶¶ 1 through 75 above as though set out hereinbelow in full.

74. On or about January 15, 1995, through March 1996, the events as alleged in ¶¶ 44 through 75 took place. Thereafter, Jackson Correctional Institution promoted CO Ronald Edenfield (5½ years experience), CO David Rabon (4 years experience), CO Abner Bowen (4 years experience), and CO Ronald Speets (6 years experience) and many many more who were younger and less qualified than Plaintiff. In retaliation for having filed a grievance, Defendants Folsom and Childs did not bother to even consider Plaintiff for promotion, and promoted the aforementioned younger and less qualified selectees.

78. Defendants discriminated and retaliated against Plaintiff by refusing to promote, despite a promotion being promised as a condition of accepting the job as a corrections officer in the first instance, and helping to build the prison. Defendants benefitted and took advantage of Plaintiff's construction skills. For instance, Plaintiff discovered that toilets were being improperly installed and corrected the defect.

79. Plaintiff also discovered the lighting was being improperly hung. Plaintiff pointed out to his supervisors Folsom and Childs, that if they left the lights as they were, inmates could reach them to damage them, causing a security problem at night.

80. All of the above acts were done in a discriminatory manner, because Plaintiff was not granted promotion or given adequate consideration. Defendants again promoted selectees outside of the protected class who were less qualified and younger than Plaintiff.

81. All conditions precedent to filing suit have been performed, and this suit is timely filed.

WHEREFORE, Plaintiff respectfully prays that this court:

1. Issue an order enjoining Florida Department of Corrections Jackson County, Jackson Correctional Institu-

tion, Jim Folsom, a/k/a Jim Folsom Superintendent Jackson County Correctional Institution, and James Edward Childs, a/k/a Major J.E. Childs, a/k/a Colonel Childs to cease and desist from the conduct described in this complaint, and from harassing or discriminating against Plaintiff in any manner whatsoever.

2. Issue an order requiring Florida Department of Corrections Jackson County, Jackson Correctional Institution to institute meaningful procedures designed to prevent and punish future similar conduct.

3. Order the promotion of Plaintiff to Lieutenant as of the above date and with all benefits he would have if he had not suffered adverse employment action attributable to age discrimination, or award Plaintiff front pay in the amount of \$144,000.00 if promotion is determined at trial to be impractical.

4. Award Plaintiff back pay, including overtime pay, pension benefits, and other employment benefits which would have accrued if Plaintiff's promotion had not unlawfully been withheld as determined by this court after a hearing.

5. Award Plaintiff compensatory damages for his emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life in the amount of \$140,000.00 pursuant to Title 42 U.S.C. 1981a et seq.

6. Award Plaintiff punitive damages in the amount of \$160,000.00 pursuant to Title 42 U.S.C. 1981a et seq.

7. Award Plaintiff attorney's fees, including expert witness fees, pursuant to 42 U.S.C. 2000e-5(k).

8. Award Plaintiff costs, interest, and such other relief as this Court may deem proper.

Plaintiff demands a jury trial on all issues so triable.



## COUNT VI

RETALIATION & DISCRIMINATION FOR FILING  
GRIEVANCE AGAINST DEFENDANTS BECAUSE  
OF AGE DISCRIMINATION FAILURE TO  
PROMOTE, RESULTING IN LOSS OF PAY IN  
VIOLATION OF 29 U.S.C.S. §§ 623(d) &  
TITLE 42 U.S.C. §§ 2000e-3(a)

82. Plaintiff readopts and incorporates by reference the allegations in ¶¶ 1 through 80 above.

83. Defendants' repeated failure to promote Plaintiff from January 20, 1996 through the present date, in light of PBA and Florida Human Relations Commission findings telling them to reconduct the promotion process and give Plaintiff the next available CO Sergeants can only be characterized as callous disregard and indifference to Plaintiff's civil rights.

84. The defendants acts and omissions in this complaint demonstrate that Defendants Florida Department of Corrections Jackson County, Jim Folsom, and Jackson Correctional Institution had knowledge of Defendant Childs' actions regarding the treatment of Plaintiff. The failure to correct or remedy the unlawful conduct when given the FCHR's finding and report of misconduct resulting from their hearing on June 9, 1995 show ratification of the unlawful acts.

WHEREFORE, Plaintiff respectfully prays that this court:

1. Issue an order enjoining Florida Department of Corrections Jackson County, Jackson Correctional Institution, Jim Folsom, a/k/a Jim Folsom Superintendent Jackson County Correctional Institution, and James Edward Childs, a/k/a Major J.E. Childs, a/k/a Colonel Childs to cease and desist from the conduct described in this complaint, and from harassing or discriminating against Plaintiff in any manner whatsoever.

2. Issue an order requiring Florida Department of Corrections Jackson County, Jackson Correctional Institution to institute meaningful procedures designed to prevent and punish future similar conduct.

3. Order the promotion of Plaintiff to Lieutenant as of the above date and with all benefits he would have if he had not suffered adverse employment action attributable to age discrimination, or award Plaintiff front pay in the amount of \$144,000.00 if promotion is determined at trial to be impractical.

4. Award Plaintiff back pay, including overtime pay, pension benefits, and other employment benefits which would have accrued if Plaintiff's promotion had not unlawfully been withheld as determined by this court after a hearing.

5. Award Plaintiff compensatory damages for his emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life in the amount of \$140,000.00 pursuant to Title 42 U.S.C. 1981a et seq.

6. Award Plaintiff punitive damages in the amount of \$160,000.00 pursuant to Title 42 U.S.C. 1981a et seq.

7. Award Plaintiff attorney's fees, including expert witness fees, pursuant to 42 U.S.C. 2000e-5(k).

8. Award Plaintiff costs, interest, and such other relief as this Court may deem proper.

Plaintiff demands a jury trial on all of the above counts.

Dated: 5/8/96

/s/ Donna K. Gardner  
DONNA K. GARDNER  
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[Filed Jul. 19, 1996]

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION

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Civil Action No. 94-AR-2962-S

RODERICK MACPHERSON, *et al.*,  
Plaintiffs

vs.

UNIVERSITY OF MONTEVALLO,  
Defendant

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MEMORANDUM OPINION

The court has before it the motion for partial summary judgment filed by defendant, University of Montevallo ("the University"). Plaintiffs, Roderick MacPherson ("MacPherson") and Marvin Narz ("Narz"), allege that the University is liable to them under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("the ADEA"), for retaliation, for a hostile working environment, for disparate treatment age discrimination and for disparate impact age discrimination. Plaintiffs also allege that the University trampled their right to engage in free speech in retaliation for engaging in acts protected by the ADEA. Because the University fails to persuade the court that no genuine issues of material fact exist with regards to most of these claims, the summary motion is due to be granted only in part.

I. Undisputed Facts

The court starts by adopting the parties' joint statement set forth in the court's pre-trial order of June 26, 1996, as follows:

Plaintiffs Roderick MacPherson (YOB 1937) and Marvin Narz (YOB 1936) are employed by defendant University of Montevallo as faculty members in the College of Business ["the COB"]. Both hold the rank of Associate Professor. The Dean of the College of Business is Dr. William Word ["Word"], who has been the Dean since 1979. There are 13 faculty members (not including the Dean) in the College of Business.

The plaintiffs first filed suit under the ADEA against the University in 1988. See *MacPherson v. University of Montevallo*, 922 F.2d 766 (11th Cir. 1991) ["*MacPherson I*"]. That case was resolved by a Settlement Agreement and Release signed by the plaintiffs on July 10, 1992.

Thereafter, the plaintiffs filed this their second lawsuit on December 18, 1994.

MacPherson was hired by the University as an assistant professor in 1973 with the primary responsibility for teaching marketing. He was promoted to associate professor in 1980. Narz was hired by the University as an associate professor in 1978. Narz has never been promoted by the University. Both plaintiffs applied for promotion to full professor in 1993, 1994, 1995 and 1996. Word chaired the COB's promotion committee in each of these years.

Plaintiffs have repeatedly requested sabbatical leave since July 10, 1992. None of MacPherson's requests for sabbatical leave were granted. Although one of Narz's

requests was approved by Word, the cost of the leave was established by Word at \$8,000. Due to the estimated cost of that sabbatical leave, this request was rejected by the University.

Plaintiffs have also requested appointment to university-wide and COB committees. Neither plaintiff has been appointed to such a committee since the early 1980s. Certain COB committees are responsible for course and faculty assignments within the COB.

After the settlement in *MacPherson I*, the University adopted the College and University Personnel Association ("CUPA") average salary standard, a new university-wide salary policy. Under CUPA, money can be channeled to one of the University's colleges to address individual salary differences if that college's average salary is below the national CUPA average. Because salaries as a whole in the COB exceed the national CUPA average, none of this channeled money has reached the COB for salary increases for COB faculty. Every member of the COB faculty is older than 40 years of age.

The agreement that settled *MacPherson I* included lump sum payments and salary increases as well as favorable class assignment guarantees for plaintiffs. In exchange, plaintiffs each signed the following release:

Plaintiffs hereby fully release, discharge, and exonerate defendant University of Montevallo, its trustees, officers, agents, servants, and employees in their individual and official capacities, from any and all claims, demands, actions, causes of actions, judgments, costs, expenses, debts, or obligations of any kind and character whatsoever arising to date out of or relating to their employment which plaintiffs have, had, may have or may have had against the parties

hereby released or which was or might have been claimed to be due plaintiffs from the parties hereby released.

*Defendant's exh 20*, at ¶ 6.

## II. Analysis

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." F.R.Civ.P. 56(c). The inquiry when ruling on a Rule 56 motion is "'whether the evidence presents a sufficient disagreement to require submission to [the trier of fact] or whether it is so one-sided that one party must prevail as a matter of law.'" *Jeffery v. Sarasota White Sox, Inc.*, 64 F.3d 590, 594 (11th Cir. 1995) (*per curiam*) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

The University concedes that genuine issues of material fact exist with regards to plaintiffs' claims of ADEA disparate treatment discrimination with regards to promotions, committee appointments and sabbatical leave.<sup>1</sup> The University, however, asks that summary judgment be granted in its favor as to the remainder of plaintiffs' claims.

### A. ADEA Disparate Impact Discrimination

The University spends much of its effort arguing that there is no cause of action under the ADEA based upon a theory of disparate impact discrimination. Plaintiffs

<sup>1</sup> See also section II.E, *infra*, regarding the University's apparent concession of the viability of plaintiffs' free speech claims.



direct the court's attention to *MacPherson I* for the proposition that the Eleventh Circuit has, in fact, recognized such a claim. In response the University argues:

The plaintiffs present the court with the astounding representation that "the Eleventh Circuit has expressly adopted the disparate impact theory of recovery under the ADEA" in their first lawsuit. The depth of the plaintiffs' error measures the desperation of their argument. The Eleventh Circuit said nothing which could be interpreted that way.

*Defendant's reply brief at 7.*

This court also reads *MacPherson I*, specifically section III.A of that opinion, and it obtains not the foggiest idea how the University could seriously call plaintiffs "desperate." Upon considering these very same plaintiffs' appeal from a directed verdict in favor of the University on their previous disparate impact claim, the *MacPherson I* court devoted three plus pages to discussing *how* an age discrimination disparate impact claim could be *proved* and *refuted* and then said:

Because we find that plaintiffs failed to meet their burden under a disparate impact theory of age discrimination, *we have assumed—without deciding—that a disparate impact claim of age discrimination can be made* where (as here) plaintiffs allege a practice that encompasses more than one point in the employment process. *We have also assumed—without deciding—that a disparate impact claim of age discrimination can be made* where (as here) plaintiffs allege a practice which is based on the market.

*MacPherson I*, 922 F.2d at 773 n.14 (emphasis added). This court finds that plaintiffs' reliance on *MacPherson I* for the proposition that an ADEA cause of action based

on disparate impact exists in the Eleventh Circuit is not all that far fetched. The truth is that the question remains undecided.

The University argues that whatever precedential value *MacPherson I* might have on this issue has been muted by the Supreme Court in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993). The University argues that although *Hazen Paper* "did not shout 'No' to the question, it certainly whispered it loud enough for all to hear." *Defendant's reply brief at 5*. This court finds the University's reliance on *Hazen Paper* remarkable. In the words of the Supreme Court, the latest and greatest news on this question is: "By contrast, we have never decided whether a disparate impact theory of liability is available under the ADEA, *and we need not do so here.*" *Hazen Paper*, 507 U.S. at 610 (emphasis added). This is no more than an echo of *MacPherson I*.

The Supreme Court's explicit refusal to answer a question does not constitute precedent binding on this court.<sup>2</sup> Furthermore, this court is "not at liberty to disregard binding case law that is so closely on point and has been only weakened, rather than directly overruled, by the Supreme Court." *Florida League of Professional Lobbyists, Inc. v. Meggs*, No. 95-2555, 1996 WL 341221, at \*6 (11th Cir. July 9, 1996). Reading section III.A of *MacPherson I* as it does, this court agrees with plaintiffs that

<sup>2</sup> The University also relies heavily in this portion of its argument on the concurring opinion of Justice Kennedy in *Hazen Paper*, where he stated "there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA." *Hazen Paper*, 113 S.Ct. at 1710 (Kennedy, J., concurring). This reliance is equally unpersuasive. A concurring opinion, like a "plurality opinion[,] is not binding on this Court." *Myrick v. Freuhauf Corp.*, 13 F.3d 1516, 1523 (11th Cir. 1994), *aff'd*, 115 S.Ct. 1483 (1995).



the Eleventh Circuit hints strongly that a cause of action for disparate impact age discrimination under the ADEA exists. While this interpretation may indeed prove to be false when this action, or another like it, reaches the Eleventh Circuit and it is given a chance to state clearly its position on ADEA disparate impact theory,<sup>3</sup> for now this court will allow plaintiffs to proceed on the assumption that a cause of action does exist in the Eleventh Circuit, and therefore in this court, for disparate impact age discrimination under the ADEA.

Having assumed, along with the Eleventh Circuit, that a cause of action exists for disparate impact discrimination under the ADEA, the court must now determine whether plaintiffs have produced sufficient evidence to entitle them to go to trial on the question of disparate impact. "Under disparate impact theory, discrimination can be established by proving that a facially neutral employment practice, which is unjustified by a legitimate business goal of the employer, has a disproportionately adverse impact on the members of a protected group." *MacPherson I*, 922 F.2d at 771 (citing *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 655-56 (1989)). The *prima facie* case for disparate impact age discrimination requires plaintiffs to "isolate and identify" the employment practice they claim is responsible for the alleged statistical imparities. *Id.* Plaintiffs must not only be able

<sup>3</sup> The Eleventh Circuit appears to be in favor of allowing appellate courts, those courts with the authority to turn legal disputes into binding precedent, the opportunity to revisit past decisions in order to revise questionable/unclear positions. See *Mosher v. Speedstar Div. of AMCA Int'l, Inc.*, 52 F.3d 913, 916-17 (11th Cir. 1995) ("[w]here there is any doubt as to the application of state law, [the district] court should certify the question to the state supreme court to avoid making unnecessary *Erie* 'guesses' and to offer the state court the opportunity to interpret or change existing law.") (emphasis added).

to show that an imbalance exists, but also that "the application of [the] employment practice . . . has created the disparate impact under attack." *Id.*

In support of their disparate impact claim, plaintiffs submit the report of their "expert," Dr. George Ignatin ("Ignatin"), in which Ignatin attempts to correlate the salary inadequacies claimed by plaintiffs to CUPA—the university-wide salary policy adopted by the University after the settlement of *MacPherson I*. According to Ignatin, CUPA establishes a salary formulation whereby older professors' salaries are either depressed or stagnant while new money can be and is directed by the University to younger faculty.

The University does not attempt to discount the factual basis for Ignatin's theory nor the soundness of his conclusions. Nor does the University offer evidence that CUPA "serves, in a significant way, the legitimate employment goals of the employer," the primary means of refuting a *prima facie* case of disparate impact. *MacPherson I*, 922 F.2d at 771. The University, instead, asks the court to refuse to consider this latest submission by Ignatin inasmuch as it was submitted by plaintiffs after the time for filing expert reports called for in the court's scheduling order entered on March 28, 1995.

The scheduling order in this action called for the parties to supplement all expert reports at least 30 days before a pre-trial conference. The pre-trial conference was held in this action on June 26, 1996. The latest report by Ignatin, submitted by plaintiffs on June 28, 1996, was clearly outside of that time. Because this tardiness would make this portion of Ignatin's expert testimony subject to exclusion at trial through a motion *in limine*, the University argues that it cannot now be used by plaintiffs to avoid summary judgment.

When ruling on motions for summary judgment, the court is ordinarily constrained to consider "*admissible evidence*, [showing] affirmatively that the [proponent] is competent to testify to the matters stated therein." F.R.Civ.P. 56(e) (emphasis added). In spite of this seemingly plain directive in Rule 56(e), it is unclear in the Eleventh Circuit whether information contained in Rule 56 evidentiary materials, especially that submitted by a non-movant, must be admissible at trial in order to be considered at the summary judgment stage. See *International Ship Repair and Marine Services, Inc. v. St. Paul Fire & Marine Ins. Co.*, 906 F. Supp. 645, 648 (M.D. Fla. 1995) (citing *Church of Scientology Flag Service Org. v. City of Clearwater*, 2 F.3d 1514, 1530 (11th Cir. 1993), *cert. denied*, 115 S.Ct. 54 (1994) (materials inadmissible at trial may be submitted by non-moving party in opposing Rule 56 motion); *Offshore Aviation v. Transcon Lines, Inc.*, 831 F.2d 1013, 1015 & n.1 (11th Cir. 1987) (letter composed of inadmissible hearsay may be considered at summary judgment stage)).

While this court could expend great amounts of time and energy sorting through plaintiffs' supporting material in an effort to cull that which might not be admissible, it chooses instead to embrace the resolution reached by its sister court in *International Ship*. As the court did there, the court will consider *all* evidence submitted by plaintiff as non-movant, admissible or not, in ruling on the University's Rule 56 motion. The question of the admissibility of the third Ignatin report will be postponed until trial.<sup>4</sup>

<sup>4</sup> The University has, however, provided sufficient grounds for a request to re-depose Ignatin in light of this latest report. Should the University move to do so, and expecting no objection from plaintiffs, such a motion will be granted.

The University has mounted no serious challenge as to whether the evidence thus far submitted by plaintiffs creates a question as to whether CUPA, as a university-wide salary policy, disproportionately and impermissibly impacts the salaries of faculty in the age group protected by the ADEA. Plaintiffs have satisfied the court that a genuine issue of material fact exists with regard to their claims of disparate impact discrimination under the ADEA. As a result, the University's motion for summary judgment will be denied as to those claims.

### B. Retaliation

A plaintiff alleging retaliation under the ADEA establishes a *prima facie* case by showing "(1) that [he] engaged in statutorily protected activity, (2) that an adverse employment action occurred, and (3) that the adverse action was causally related to the plaintiff's protected activities." *Coutu v. Martin County Bd. of County Comm'rs*, 47 F.3d 1068, 1974 (11th Cir. 1995) (Title VII retaliation). Of the three elements of this *prima facie* case, the University only disputes the element of causation. On the issue of causation, "a plaintiff merely has to prove that the protected activity and the negative employment action are not completely unrelated." *Id.* (citation omitted).

Plaintiffs have presented evidence that Word, who conducted subjective yet important teaching evaluations of plaintiffs that affected merit raises and promotions, considered plaintiffs' lawsuit and subsequent grievances to be "harassment." *Word depo. I* at 78. Plaintiffs have also submitted proof that after the settlement of *MacPherson I*, they were denied promotions within the COB. they were denied requested sabbaticals to do research necessary for promotion, they have not been appointed



to COB and university-wide committees by Word and they were not offered lucrative retirement packages offered to other faculty pursuant to a university-wide plan.

For the purposes of summary judgment, this evidence crawls past the threshold of proof that the prior lawsuit and grievances filed by plaintiffs are not wholly unrelated to the negative employment decisions described above. As a result, plaintiffs have demonstrated that a genuine issue of material fact exists on their claims of ADEA retaliation. Accordingly, the University's motion for summary judgment must be denied as plaintiffs' claims of ADEA retaliation.

### C. Salary Claims

In its brief, the University concedes that triable issues exist insofar as plaintiffs have made a disparate treatment discrimination claim under the ADEA with regards to (1) merit pay increases plaintiffs may have been denied since July of 1992, and (2) salary increases that might have resulted if plaintiffs had been promoted since July of 1992. Plaintiffs' remaining disparate treatment salary claim is that "Dean Word has failed to adjust Plaintiffs' salaries to eradicate inequities . . . ." *Plaintiffs' brief* at 11.

This lone remaining claim can only be interpreted to mean that plaintiffs seek redress for the alleged inadequacy of their salaries resulting from age discrimination prior to the settlement of *MacPherson I*. As an absolute defense to this claim, the University asserts that the releases and waivers signed by plaintiffs in conjunction with the settlement of *MacPherson I* bar any claim plaintiffs might have in regards to their salaries as they existed prior to July of 1992. This court agrees. As employment discrimination plaintiffs, *MacPherson* and *Narz*:

may release not only claims for additional back pay, but also claims for other relief including injunctive provided the released claims arise from antecedent discriminatory events, acts, patterns, or practices, or the 'continuing' or 'future' effects thereof so long as such effects are causally rooted in origin, logic, and factual experience in discriminatory acts or practices which antedate the execution of the release, and provided, of course, that the release is executed voluntarily and with adequate knowledge . . . .

*United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 853 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976) (emphasis added).<sup>5</sup> Because plaintiffs do not attack the validity of these releases and also because settlement of employment discrimination actions is to be encouraged, the court must give the releases the greatest effect possible.

As set out before, in exchange for a lump sum payments and instantaneous raises plaintiffs signed releases that waived their right to any claims for salary discrimination "arising to date out of or relating to their employment." If plaintiffs are now attempting to claim that raises since that settlement still do not address the gap that existed at the negotiated termination of *MacPherson I*, such claims are merely a back door attempt to circumvent their releases. This they will not be allowed to do.

Because plaintiffs signed releases that effectively waived any right they might have had to salary discrimination claims prior to July 10, 1992, they can not now claim that raises since that time have failed to make up for

<sup>5</sup> The Eleventh Circuit adopted as precedent decisions of the old Fifth Circuit. *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1209-10 (11th Cir. 1981) (*en banc*).



discrimination that existed prior to July 10, 1992. To the extent plaintiffs attempt to make such a claim, the University's motion will be granted, and that portion of plaintiffs' action will be dismissed with prejudice.

#### D. Hostile Environment

Plaintiffs concede that their hostile environment discrimination claims are due to be dismissed. In fact they are so lacking in merit that an adverse reaction to plaintiffs by their employer, if there was such a reaction, might not constitute "retaliation." See *Amos v. Housing Auth. of Birmingham Dist.*, 927 F. Supp. 416 (N.D. Ala. 1996), *op. supplemented by Amos v. Housing Auth. of Birmingham Dist.*, 1996 WL 380521 (N.D. Ala. Apr. 15, 1996). Accordingly, the University's motion for summary judgment will be granted as to those claims, and plaintiffs' action, insofar as they make claims of hostile environment discrimination, will be dismissed with prejudice.

#### E. First Amendment

Left standing despite by the University's Rule 56 motion are plaintiffs' claims that the University has abridged their First Amendment right to engage in free speech by retaliating against them for filing employment related grievances and an employment discrimination lawsuit.<sup>6</sup> As the University is surely aware, in order to obtain summary judgment in its favor, it must initially shoulder the burden of "infor[ming] the district court of the basis for [its] motion." *Celotex Corp. v. Cartrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986). This requires, at a

<sup>6</sup> To preempt any argument by the University that plaintiffs have abandoned this claim, the court notes that plaintiffs reiterate their "free speech" claim in paragraph 5(a) of the pretrial order entered on June 26, 1996, which represents plaintiffs' final pleadings in this action. Rule 16(e), F.R.Civ.P.

minimum, that "[t]he moving party . . . show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991) (emphasis added).

The court devoutly wishes to eliminate all spurious issues before trial and can divine arguments which, had they been made, would have been successful as to the "free speech" claims. The tragedy in the University's failure to so argue is that the court is quite certain that both the court's time and the parties' time will be spent addressing this very same issue in a Rule 50 motion when the matter could now be put to bed. Perhaps plaintiffs will concede that these claims are a waste of time and will waste no more time on them. The scheduling order required parties to retreat from unmeritorious positions. As of this moment, however, because the University has failed to address the free speech claims (ignoring them may have been the University's ineffectual way of suggesting that they lack viability), the University's motion will be denied as to plaintiffs' claims that the University violated their right to free speech protected by the First Amendment.<sup>7</sup>

#### III. Conclusion

The University has demonstrated, and plaintiffs have failed to refute, that the releases signed by MacPherson and Narz on July 10, 1992, preclude any claims in this action regarding age discrimination that might have oc-

<sup>7</sup> The court is, of course, aware that the First Amendment (1) does not provide a private right of action for the enforcement of its protections, (2) is not directly applicable to the University as the representative arm of the State of Alabama and (3) requires that the subject matter of protected speech be of general public interest. However, the court would not have to make much of a "notice pleading" stretch to find that plaintiffs have pled sufficient facts for a claim under the Fourteenth Amendment pursuant to 42 U.S.C. § 1983.

curred before that date. As a result, the University is entitled to summary judgment on plaintiffs' claims that the denial of salary increases after July 10, 1992, failed to address age discrimination that might have occurred prior to July 10, 1992, is also actionable age discrimination. To the extent plaintiffs make such claims, the University's motion for partial summary judgment will be granted, and plaintiffs' action, insofar as they make such a claim, will be dismissed with prejudice. Because plaintiffs also concede that the University is entitled to judgment as a matter of law as to their claims of hostile environment ADEA discrimination, the University's motion will be granted as to those claims, and plaintiffs' action, insofar as they make such claims, will be dismissed with prejudice.

In contrast, plaintiffs have shown under Rule 56 standards that genuine issues of material fact exist with regards to all other claims attacked by the University in its Rule 56 motion. Accordingly, the University's motion will be denied as to plaintiffs' claims of disparate treatment and disparate impact discrimination and retaliation under the ADEA as well as plaintiffs' claims that the University has impermissibly interfered with their right to engage in the free speech protected by the First Amendment.

A separate and appropriate order will be so entered.

DONE this 19th day of July, 1996.

/s/ William M. Acker, Jr.  
WILLIAM M. ACKER, JR.  
United States District Court

[Filed Jul. 19, 1996]

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION

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[Caption Omitted]

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**ORDER**

In conformity with the accompanying memorandum opinion, the court EXPRESSLY DETERMINES that there exist no genuine issues of material fact as to certain issues and that defendant, University of Montevallo ("the University"), is entitled to summary judgment as a matter of law as to said issues. Accordingly, it is ORDERED, ADJUDGED and DECREED by the court that the motion for partial summary judgment of the University be and the same is hereby GRANTED as to:

(1) plaintiffs' claims that the University's failure to award them pay raises after July 10, 1992, to redress age discrimination that might have occurred prior to July 10, 1992, is actionable age discrimination in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("the ADEA"); plaintiffs' action, to the extent they make such claims, is dismissed with prejudice;

(2) plaintiff's claims that the University is liable for hostile environment age discrimination in violation of the ADEA; plaintiffs' action, to the extent they make such claims, is dismissed with prejudice.

The University's motion for partial summary judgment, to the extent it is addressed to the remainder of plaintiffs'

claims, is DENIED. Surviving the University's Rule 56 motion are plaintiffs' claims that the University has violated their constitutional right to engage in free speech and has engaged in disparate impact discrimination, disparate treatment discrimination and retaliation in violation of the ADEA. Plaintiffs' action, insofar as they make these claims, shall proceed to trial.

DONE this 19th day of July, 1996

/s/ William M. Acker, Jr.  
WILLIAM M. ACKER, JR.  
United States District Court

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF FLORIDA  
PANAMA CITY DIVISION

Case No. 5:96cv207-RH

WELLINGTON N. DICKSON,  
a/k/a "Duke",

*Plaintiff,*

vs.

FLORIDA DEPARTMENT OF CORRECTIONS,  
*Defendant.*

ANSWER, AFFIRMATIVE DEFENSES AND  
JURY TRIAL DEMAND

Defendant FLORIDA DEPARTMENT OF CORRECTIONS, by and through undersigned counsel, hereby files this ANSWER, AFFIRMATIVE DEFENSES AND JURY TRIAL DEMAND, and states as follows:

ANSWER

1. Admits Plaintiff is a resident of Marianna County, Florida.
2. Admits Florida Department of Corrections (DOC) is an entity created under Florida law with a principle place of business in the State of Florida, at the City of Tallahassee, and that the DOC oversees a prison facility in Jackson County.
3. No response required.
4. Admits Folsom and Childs are employees of DOC. Otherwise, no response required.



5. Admits DOC is an "employer" as defined under the ADA and ADEA.

6. Admits that this action was brought under the ADA and the ADEA, but denies that this court has subject matter jurisdiction and denies that the action has merit.

7. Admits that Plaintiff filed a charge with the Florida Commission on Human Relations and the Equal Employment Opportunity Commission.

8. Defendant is without knowledge as to the allegations in Paragraph 8, and therefore those allegations are denied.

9. Denied.

10. Defendant incorporates the responses to numbers 1 through 9 above.

11. Admits that Plaintiff was employed as a Corrections Officer at Apalachee Correctional Institution. Defendant is without knowledge as to the remainder of the allegations in Paragraph 11, and therefore those allegations are denied.

12. Denies that promotions at any institution are limited by any unlawful means. Defendant is without knowledge as to the allegations in Paragraph 12, and therefore those allegations are denied.

13. Admits those individuals applied for jobs at Jackson Correctional Institution (JCI). Admits that Major Childs noted the possibility of promotion under the appropriate circumstances. Denies any promise of promotion.

14. Admits Plaintiff was hired as a Correctional Officer at JCI. Admits Plaintiff assisted in construction work at JCI. Defendant is without knowledge as to the remainder of the allegations in Paragraph 14, and therefore, those allegations are denied.

15. Admits various CO Sergeant positions became available in 1991. Defendant is without knowledge as to the remainder of the allegations in Paragraph 15, and therefore, those allegations are denied.

16. Denies that Plaintiff was subjected to harassment or retaliation. Defendant is without knowledge as to the remainder of the allegations in Paragraph 16, and therefore, those allegations are denied.

17. Denies Plaintiff was the most qualified for the positions of CO Sergeant for which he applied. Admits Plaintiff was desirous of promotion to Sergeant. Defendant is without knowledge as to the remainder of the allegations in Paragraph 17, and therefore, those allegations are denied.

18. Defendant is without specific knowledge of the information set forth in the first sentence of Paragraph 18, and therefore that allegation is denied. The second allegation of Paragraph 18 is denied. The third allegation of Paragraph 18 is denied as stated. Defendant is without sufficient knowledge as to the remainder of the allegations, and therefore, those allegations are denied.

19. Defendant admits the allegations set forth in the first, second, third, and fourth sentences of Paragraph 19. Defendant is without sufficient knowledge with regard to the consistent timeliness of applications for promotion submitted by Plaintiff, and therefore that allegation is denied. Defendant denies that the usual procedures for promotion were circumvented and denies that Plaintiff was discriminated against in any fashion.

20. Denies that Plaintiff was more qualified than those selected for promotions. Defendant is without knowledge of Plaintiff's age at the time in question and therefore that allegation is denied.

21. Defendant denies that any individual selected for promotion was less qualified than Plaintiff. Defendant is without sufficient knowledge as to whether the named individuals received the promotions in question and therefore that allegation is denied.

22. Admits that various CO Sergeant positions became available during 1992. Defendant is without knowledge of whether or when Plaintiff learned of these openings and therefore denies this allegation.

23. Defendant denies that Plaintiff was more qualified for the Sergeant positions than those selected. Admits that Plaintiff desired promotion.

24. Defendant is without sufficient knowledge of the individual selected for the position in question, or that individuals age or background, and therefore those allegations are denied. Defendant denies that any individual selected for promotion was less qualified than Plaintiff.

25. The allegations set forth in the first sentence of Paragraph 25 are denied are written. The allegations of the second sentence are denied.

26. Denies that Plaintiff was more qualified for the positions sought. Defendant is without knowledge of Plaintiff's exact age at the time in question and therefore that allegation is denied. Defendant admits Plaintiff was over 40 years of age.

27. Defendant admits Plaintiff submitted a yearly application for advancement in 1992, and admits there were openings for the position of CO Sergeant in 1992. Defendant is without sufficient knowledge as to the remaining allegations of Paragraph 27 and therefore those allegations are denied.

28. Defendant admits there were openings for the position of CO Sergeant in 1992 at JCI.

29. Defendant admits there were openings for the position of CO Sergeant in 1992 at JCI. Admits that Plaintiff was interviewed but did not receive a promotion, and that Lee Blalock was promoted at this time. Denies that any individual promoted was less qualified than Plaintiff.

30. Admits the allegations in the first sentence of Paragraph 30. Defendant is without sufficient knowledge as to the individual promoted at this time since no position numbers were provided, and therefore those allegations are denied. Defendant is without sufficient knowledge as to the remaining allegations in Paragraph 30, and therefore those allegations are denied.

31. Denied.

32. Admits there were openings for the position of CO Sergeant in 1994. Denies the allegations in the second sentence of Paragraph 32 and denies that Plaintiff was subjected to any unlawful discrimination. Admits that the named individuals were promoted. Is without sufficient knowledge as to the affiliations of the named individuals with Major Childs and therefore those allegations are denied.

33. Admits there were openings for the position of CO Sergeant in 1994. Is without sufficient knowledge as to the individual placed in the position in question. Denies that the individual was less qualified for the position than Plaintiff.

34. Admits there were openings for the position of CO Sergeant in 1994. Denies Plaintiff was preselected for any position. Defendant is without sufficient knowledge as to the remaining allegations and therefore those allegations are denied.

35. Admits there were openings for the position of CO Sergeant in 1994. Defendant is without sufficient



knowledge as to the individuals selected for the positions in question, and therefore those allegations are denied. Defendant denies the remaining allegations in Paragraph 35.

36. Admits Plaintiff filed a grievance with the Police Benevolence Association. Defendant is without sufficient knowledge regarding the remaining allegations and therefore those allegations are denied.

37. Admits that Plaintiff filed a charge with the Florida Commission on Human Relations on or about October 25, 1994 claiming age and disability discrimination. Defendant is without sufficient knowledge as to whether or when Plaintiff filed a complaint with the PBA and therefore those allegations are denied.

38. Admits Plaintiff submitted some letters from physicians to agents of the Defendant and the letters indicated that Plaintiff could continue his duties as a Correctional Officer with the exception of climbing the 60 foot towers and heavy construction work. Defendant is without sufficient knowledge as to the remaining allegations and therefore those allegations are denied.

39. Defendant is without sufficient knowledge as to the allegations set forth in Paragraph 39, and therefore those allegations are denied.

40. The allegations of the first sentence of Paragraph 40 are denied as written. Defendant is without sufficient knowledge as to the remaining allegations of Paragraph 40, and therefore those allegations are denied.

41. Defendant is without sufficient knowledge as to the allegations set forth in Paragraph 41, and therefore those allegations are denied.

42. Admits Plaintiff used some leave time in November of 1994. The remaining allegations are denied as

written. Defendant denies that Plaintiff was subjected to harassment.

43. Admits that Plaintiff worked for Defendant in 1994 and that there were various openings for the position of CO Sergeant during 1994. Admits that Plaintiff interviewed for various CO Sergeant positions at JCI. Defendant denies that Plaintiff was more qualified than any of the individuals selected for the positions Plaintiff sought. Defendant is without sufficient information as to the Plaintiff's conversation with Mr. Boyd and therefore that allegation is denied.

44. Admits CO Sergeant Positions 29377, 29376, 29375, and 29374 were open in January of 1995. Denies that Plaintiff was discriminated against. Admits that the individuals named in Paragraph 44 were selected for the above referenced positions. Denies that Plaintiff was subjected to retaliation. Denies that Plaintiff was more qualified than the selected applicants.

45. Admits positions 24717, 24623, 24674, 24675, became available in 1995. Admits Plaintiff sought promotion to CO Sergeant in 1995. Denies that Plaintiff was not considered or passed over for less qualified applicants. Admits that the listed individuals were selected for the referenced positions.

46. Admits positions 24719, 24661, and 24658, became available in 1995 and that Plaintiff applied for those positions. Admits that Officers Paramore, Krause, and Butler were hired for those positions. The remainder of the allegations are denied. Defendant denies that the individuals hired for those positions were less qualified than Plaintiff.

47. Admits positions 24690 and 24674 became available in 1995. The remaining allegations of Paragraph 47 are denied.



48. Admits positions 33416 and 33417 became available in 1995. Denies Plaintiff was subjected to retaliation. Denies any individual hired or promoted to these positions was less qualified than Plaintiff. Admits Plaintiff was over the age of 40 in 1995. Admits that Officers Edge and Powe were selected for these positions. Denies any other allegations set forth in Paragraph 48.

49. Admits openings for the position of CO Sergeant in 1996. Admits Plaintiff desired promotion to the position of CO Sergeant. The remaining allegations are denied as written. Defendant denies that any individual hired or promoted for a position sought by Plaintiff was less qualified than Plaintiff.

50. Defendant realleges and adopts by reference the answers set forth in Paragraphs 1 through 49 above. Admits that Positions 24620 and 24732 were open in July of 1994. The remaining allegations are denied as written. Defendant denies that Plaintiff was promised a promotion.

51. Admits that Plaintiff falls within the age group identified in the Age Discrimination in Employment Act. Defendant denies that Plaintiff was promised a promotion. The remaining allegations are denied as written.

52. Admits that there are guidelines for use in consideration of individuals for promotion. Denies that any procedure, guideline, or standard was circumvented or misapplied by Defendant or agents of Defendant for any unlawful purpose.

53. Denies that Plaintiff was more qualified than the individuals selected for the positions Plaintiff sought. Admits that Plaintiff was over the age of 40 at the time in question.

54. The allegations of Paragraph 54 are denied as written. Defendant denies that Plaintiff was more quali-

fied than any individual hired for any position sought by Plaintiff.

WHEREFORE, Defendant requests that Plaintiff be afforded no relief and all claims be dismissed.

55. Defendant realleges and adopts by reference the answers of Paragraphs 1-54, set forth above. Defendant is without knowledge of Plaintiff's information at the time in question and therefore that allegation is denied. Defendant admits that there were openings for the position of CO Sergeant in 1994.

56. Admits that Plaintiff desired promotion. All other allegations are denied as written. Denies that Plaintiff was promised a promotion.

57. Admits that Plaintiff was interviewed for various Sergeant positions in 1994. All other allegations are denied.

58. Denied as written.

59. Admits the open positions for CO Sergeant were filled. The remaining allegations are denied as written.

60. Admits Plaintiff filed a grievance. Defendant is without sufficient knowledge as to the satisfaction of all prerequisites and conditions precedent and therefore those allegations are denied.

WHEREFORE, Defendant requests that Plaintiff be afforded no relief and that all claims be dismissed.

61. Defendant realleges and adopts by reference the answers of Paragraphs 1-60, set forth above. Admits that there were openings for the position of CO Sergeant in 1994.

62. Admits Plaintiff was over the age of 40 in 1994. The remaining allegations are denied.

63. Denied as written.

64. Defendant is without knowledge of Plaintiff's personal finances and therefore those allegations are denied. All other allegations are denied as written. Defendant denies that Plaintiff was subjected to any retaliation.

65. Admits Plaintiff desired promotion. All other allegations are denied as written.

66. Admits the referenced positions were filled by the named individuals. The remaining allegations are denied.

67. Denied.

68. Admits Plaintiff was over the age of 40 at the time in question. All other allegations denied.

69. Admits Officers Brown and Hearn were promoted to CO Sergeant. Defendant denies that Brown and Hearn were less qualified for promotion to Sergeant than Plaintiff. The remaining allegations are denied as written.

WHEREFORE, Defendant requests that Plaintiff be afforded no relief and that all claims be dismissed.

70. Defendant realleges and adopts by reference the answers of Paragraphs 1-69, set forth above.

71. Admits that Plaintiff desired promotion to the position of CO Sergeant. All other allegations denied as written.

72. Admits Plaintiff returned to work in November of 1994 after leave. All other allegations are denied as written.

73. Denied as written.

74. Defendant is without knowledge of Plaintiff's economic situation and therefore that allegation is denied. Defendant denies that Plaintiff was subjected to any re-

taliation. Defendant denies any violation of the ADEA or ADA. All other allegations are denied as written.

75. Denied.

WHEREFORE, Defendant requests that Plaintiff be afforded no relief and that all claims be dismissed.

76. Defendant realleges and adopts by reference the answers of Paragraphs 1-75, set forth above.

77. (Mis-numbered 74.) Defendant realleges the responses of Paragraphs 44-75. Defendant admits that Edenfield, Rabon, Bowen and Spates, were promoted to CO Sergeant. Defendant denies that those individuals, or any others hired or promoted to CO Sergeant positions sought by Plaintiff were less qualified than Plaintiff. The remaining allegations are denied.

78. Defendant is without sufficient knowledge of whether Plaintiff discovered that the toilets at JCI were improperly installed and therefore that allegation is denied. All other allegations are denied.

79. Defendant is without sufficient knowledge of the allegations of Paragraph 79, and therefore those allegations are denied.

80. Denied.

81. Defendant is without sufficient information as to whether Plaintiff has fulfilled all conditions precedent to suit and therefore that allegations is denied, as is the allegation that this suit is timely filed.

WHEREFORE, Defendant requests that Plaintiff be afforded no relief and that all claims be dismissed.

82. Defendant realleges and adopts by reference the answers of Paragraphs 1-80, set forth above.

83. Denied.

## 84. Denied.

WHEREFORE, Defendant requests that Plaintiff be afforded no relief and that all claims be dismissed.

85. Any and all statements or allegations of the Complaint not expressly admitted are denied.

## AFFIRMATIVE DEFENSES

Defendant states the following Affirmative Defenses:

1. Plaintiff has failed to state any cause of action for which relief can be granted.

2. Plaintiff has failed to sufficiently exhaust administrative remedies.

3. Plaintiff has failed to fulfill conditions precedent to bring an action in court.

4. Plaintiff is not a qualified individual with a disability under the ADA, 42 U.S.C. § 12111(8).

5. Plaintiff is not otherwise qualified within the meaning of the ADA. 42 U.S.C. § 12112.

6. Plaintiff could not reasonably be accommodated in the manner prescribed by the ADA, 42 U.S.C. § 12112.

7. Defendant's actions were required by business necessity and were based on factors other than Plaintiff's disability, if he suffers any disability.

8. Defendant's actions or inactions were premised upon bona fide occupational qualifications reasonably necessary to the normal operations of business as allowed under the ADEA, 29 U.S.C. § 623(f)(1).

9. The employment practices of the DOC are now, and have been during the time referred to in the Complaint, conducted in all respects in accordance with state and federal laws, regulations and constitutions.

10. All defenses provided and allowable by law.

## JURY TRIAL BY DEMAND

Defendant requests a trial by jury on all issues so triable by law.

Respectfully submitted,

ROBERT A. BUTTERWORTH  
Attorney General

/s/ Lynn Franklin  
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Nos. 98-796 & 98-791

# In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

FLORIDA BOARD OF REGENTS, ET AL.

J. DANIEL KIMEL, JR., ET AL., PETITIONERS

v.

FLORIDA BOARD OF REGENTS, ET AL.

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

## BRIEF FOR THE UNITED STATES

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### QUESTIONS PRESENTED

1. Whether the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, contains a clear abrogation of the States' Eleventh Amendment immunity from suit by individuals.

2. Whether the extension of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, to the States was a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, thereby constituting a valid exercise of congressional power to abrogate the States' Eleventh Amendment immunity from suit by individuals.

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## In the Supreme Court of the United States

No. 98-796

UNITED STATES OF AMERICA, PETITIONER

v.

FLORIDA BOARD OF REGENTS, ET AL.

No. 98-791

J. DANIEL KIMEL, JR., ET AL., PETITIONERS

v.

FLORIDA BOARD OF REGENTS, ET AL.

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

### BRIEF FOR THE UNITED STATES

#### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-56a) is reported at 139 F.3d 1426.<sup>1</sup> The opinions of the district courts in *Kimel v. Florida Board of Regents* (Pet. App. 57a-62a), and *Dickson v. Florida Department of Corrections* (Pet. App. 72a-76a), are unreported. The opinion of the district court in *MacPherson v. University of Montevallo* (Pet. App. 63a-71a) is reported at 938 F. Supp. 785.

#### JURISDICTION

The court of appeals entered its judgments on April 30, 1998. Petitions for rehearing were denied on August 17, 1998 (Pet. App. 77a-79a, 81a-83a). The petition for a writ of

<sup>1</sup> Throughout this brief, "Pet. App." refers to the appendix to the petition for a writ of certiorari filed by the United States in case No. 98-796.

certiorari was filed on November 13, 1998, and was granted on January 25, 1999. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved are set forth at Pet. App. 86a-102a.

#### STATEMENT

##### 1. Statutory Framework.

a. Congress began studying the problem of age discrimination in employment in the 1950s. See *EEOC v. Wyoming*, 460 U.S. 226, 229 (1983). Although Congress considered adding age to the list of presumptively prohibited bases for employment decisions in Title VII of the Civil Rights Act of 1964, see 110 Cong. Rec. 2596-2599, 9911-9913, 13,490-13,492 (1964), Congress ultimately chose, instead, to direct the Secretary of Labor to "make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination \* \* \*." Civil Rights Act of 1964, Pub. L. No. 88-352, Tit. VII, § 715, 78 Stat. 265.

The Secretary of Labor issued his report in June 1965. See *The Older American Worker: Age Discrimination in Employment* (1965) (Labor Report), reprinted in *Equal Employment Opportunity Comm'n (EEOC), Legislative History of the Age Discrimination in Employment Act* 16-41 (1981). In that report, the Secretary uncovered "substantial evidence" (Labor Report 5) of "persistent and widespread use of age limits in hiring that in a great many cases can be attributed only to arbitrary discrimination against older workers on the basis of age and regardless of ability" (*id.* at 21). See also *id.* at 5 (significant evidence of "discrimination based on unsupported general assumptions about the effect of age on ability \* \* \* in hiring practices that take the form

of specific age limits applied to older workers as a group"). The Secretary found that more than half of all employers applied arbitrary age limits that were typically set from 45 to 55 years of age (*id.* at 6); that workers over 45 represented less than five percent of new hires for most establishments (*id.* at 7); and that one-fifth of employers hired no workers over 45 at all (*ibid.*). The Secretary further found that a "significant proportion" of the age limits in effect were "arbitrary in the sense that they have been established without any determination of their actual relevance to job requirements," and were defended on pretextual grounds. *Ibid.* (emphasis omitted). The arbitrariness was underscored by the parallel finding that "[t]he competence and work performance of older workers are, by any general measures, at least equal to those of younger workers." *Id.* at 8. Finally, the Secretary called for federal legislation, explaining that "[t]he possibility of new *nonstatutory* means of dealing with such arbitrary discrimination ha[d] been explored." *Id.* at 21. "That area," however, proved "barren." *Ibid.*

Between 1965 and 1967, Congress's two relevant legislative committees and two select committees on aging conducted 18 days of hearings and compiled a record consisting of nearly 2100 pages of testimony and evidence about the problem of age discrimination in employment and the need for a national legislative response.<sup>2</sup> After that lengthy and

<sup>2</sup> See, e.g., *Employment Problems of Older Workers: Hearings on H.R. 10634 and Similar Bills Before the Select Subcomm. on Labor of the House Comm. on Educ. & Labor*, 89th Cong., 1st Sess. (1965); *Age Discrimination in Employment: Hearings on H.R. 3651, H.R. 3768, H.R. 4221 Before the General Subcomm. on Labor of the House Comm. on Educ. & Labor*, 90th Cong., 1st Sess. (1967); *Age Discrimination in Employment: Hearings on S. 830, S. 788 Before the Subcomm. on Labor of the Senate Comm. on Labor & Public Welfare*, 90th Cong., 1st Sess.

exhaustive study, Congress passed the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* Based on the evidence before it, Congress found that "arbitrary discrimination in employment" is a national problem and that "the setting of arbitrary age limits regardless of potential for job performance has become a common practice." 29 U.S.C. 621(a)(2) and (4). A primary purpose of the ADEA was "to prohibit arbitrary age discrimination in employment." 29 U.S.C. 621(b).

b. The ADEA protects employees who are at least 40 years old, 29 U.S.C. 631(a), from employment discrimination on the basis of age.<sup>3</sup> The Act makes it unlawful for employers "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age," 29 U.S.C. 623(a)(1), unless age is a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business," 29 U.S.C. 623(f)(1).<sup>4</sup> The ADEA expressly protects otherwise lawful employer action based on

(1967); *Retirement and the Individual: Hearings Before the Senate Select Comm. on Aging*, 90th Cong., 1st Sess. (1967).

<sup>3</sup> The ADEA initially covered employees only up to age 65. In 1978, Congress raised the maximum age to 70 for state, local, and private employees and eliminated the cap entirely for federal workers. See Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 3(a), 92 Stat. 189. In 1986, Congress also removed the cap for state, local, and private employees, prohibiting discrimination against virtually all workers over 40. See Age Discrimination in Employment Act Amendments of 1986, Pub. L. No. 99-592, § 2(c), 100 Stat. 3342.

<sup>4</sup> In addition, the ADEA forbids employers "to limit, segregate, or classify [their] employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age," 29 U.S.C. 623(a)(2), or "to reduce the wage rate of any employee in order to comply with this chapter," 29 U.S.C. 623(a)(3).

any "reasonable factors other than age," *ibid.*, and preserves an employer's authority to "discharge or otherwise discipline an individual for good cause," 29 U.S.C. 623(f)(3).

As originally enacted, the ADEA applied only to private employers. See Pub. L. No. 90-202, § 11, 81 Stat. 605 (29 U.S.C. 630 (Supp. III 1965-1967)). In 1974, Congress extended the ADEA's coverage to the States and local governments, after concluding that "State and local governments have also been guilty of discrimination toward older employees." 118 Cong. Rec. 7745 (1972) (Sen. Bentsen). See also S. Rep. No. 846, 93d Cong., 2d Sess. 112 (1974) (same); S. Rep. No. 300, 93d Cong., 1st Sess. 57 (1973). Congress redefined a covered "employer" to include "a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State." Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28(a)(2), 88 Stat. 74 (codified at 29 U.S.C. 630(b)), and it defined a covered "employee" as "an individual employed by any employer," other than an elected official or high-level policymaker, adviser, or member of the personal staff of an elected official, not covered by civil service laws, 29 U.S.C. 630(f).<sup>5</sup> At the same time, Congress enacted a separate provision that extended the ADEA's protections to most federal employees. 29 U.S.C. 633a.<sup>6</sup> Mandatory age limits for federal law enforcement officers and firefighters were exempted from this prohibition, see 5 U.S.C. 3307, and in 1986

<sup>5</sup> The ADEA also permits the compulsory retirement of persons employed, both in the public and private sector, in a "bona fide executive or a high policymaking position" under certain conditions. 29 U.S.C. 631(c)(1). Tenured professors were partially excluded from the ADEA's coverage from 1986 to 1993. Pub. L. No. 99-592, §§ 3(a), 6, 100 Stat. 3342, 3344.

<sup>6</sup> Congress subsequently extended the prohibitions and remedies of the ADEA to itself as well. See 2 U.S.C. 1311(a)(2) and (b)(2) (Supp. III 1997).



Congress provided a similar exemption for state and local law enforcement officers and firefighters.<sup>7</sup>

An individual aggrieved by an employer's failure to comply with the ADEA may "bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter." 29 U.S.C. 626(c)(1).<sup>8</sup> The ADEA (29 U.S.C. 626(b)) expressly incorporates many of the enforcement provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, one of which (29 U.S.C. 216(b)) authorizes individuals to file suit "against any employer (including a public agency) in any Federal or State court of competent jurisdiction."<sup>9</sup> Sixty days before bringing such an action, however, the individual must both invoke any applicable state procedures, 29 U.S.C. 633(b), and file a complaint with the EEOC, 29 U.S.C. 626(d).<sup>10</sup>

2. *Factual Background.* The private petitioners are plaintiffs in three unrelated lawsuits that the court of appeals consolidated for decision. The plaintiffs in *Kimel v.*

<sup>7</sup> See Pub. L. No. 99-592, §§ 3(a), 6, 100 Stat. 3342, 3344; Age Discrimination in Employment Amendments of 1996, Pub. L. No. 104-208, Tit. I, § 119, subsec. 1(b), 110 Stat. 3009-23 (codified at 29 U.S.C. 623(j) (Supp. III 1997)).

<sup>8</sup> Suits against the federal government must be brought in federal district court. 29 U.S.C. 633a(c).

<sup>9</sup> Congress amended Section 216(b) to its present form after *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare*, 411 U.S. 279 (1973), "to overcome that part of \* \* \* *Employees* \* \* \* which stated that Congress has not explicitly provided \* \* \* that newly covered State and local employees could bring an action [under the Fair Labor Standards Act] against their employer in a Federal court." H.R. Rep. No. 913, 93d Cong., 2d Sess. 45 (1974); see also S. Rep. No. 690, 93d Cong., 2d Sess. 27 (1974).

<sup>10</sup> The EEOC must "promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion." 29 U.S.C. 626(d). A federal employee is required to give notice to the EEOC, but informal conciliation is not mandatory. 29 U.S.C. 633a(d).

*Florida Board of Regents* and *MacPherson v. University of Montevallo* are current and former employees of universities operated by the States of Florida and Alabama, respectively. In each case, the plaintiffs filed suit in federal district court and alleged, *inter alia*, that the universities had discriminated in the allocation of benefits, such as salaries, on the basis of age. Pet. App. 64a; J.A. 22-23, 29-30, 45. The universities moved to dismiss on the ground of Eleventh Amendment immunity. The district court in *Kimel* denied the motion, holding that the ADEA contained a clear abrogation of immunity, and that the abrogation was valid because the ADEA was a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment to enforce the Equal Protection Clause. Pet. App. 57a-62a. The *MacPherson* court granted the motion on the ground that the ADEA was not a proper exercise of Congress's authority to enforce the Fourteenth Amendment. Pet. App. 65a-71a.

In *Dickson v. Florida Department of Corrections*, a state correctional officer filed suit in federal district court and alleged that the state Department of Corrections had intentionally failed to promote him and otherwise discriminated against him on the basis of his age and a medical disability, in violation of both the ADEA and the Americans with Disabilities Act of 1990 (Disabilities Act), 42 U.S.C. 12101 *et seq.* Pet. App. 72a; J.A. 88-95. The respondent moved to dismiss on the ground of Eleventh Amendment immunity. The district court denied the motion, holding that both the ADEA and the Disabilities Act were proper exercises of Congress's Section 5 power. Pet. App. 73a-75a.

3. Plaintiffs in *MacPherson* appealed from the dismissal of their action, while the defendants in *Kimel* and *Dickson* took interlocutory appeals of right from the denial of Eleventh Amendment immunity, see *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993). The United States intervened in each action to

defend the constitutionality of the ADEA's abrogation of Eleventh Amendment immunity. See 28 U.S.C. 2403(a). The court of appeals consolidated the cases for argument and concluded that the ADEA does not abrogate the States' Eleventh Amendment immunity. Pet. App. 1a-56a. The majority, however, was divided on the rationale for its decision.

Judge Edmondson found that Congress had failed to make its intent to abrogate the States' Eleventh Amendment immunity "as clear as is the summer's sun," Pet. App. 9a, because the statute does not contain "in one place, a plain, declaratory statement that States can be sued by individuals in federal court." *Id.* at 7a. In Judge Edmondson's view, the ADEA's enforcement provisions are consistent with the enforcement of the ADEA against States in federal court only by the federal government and by all private plaintiffs in state court. *Id.* at 4a n.4, 10a-11a & n.13.

Judge Cox did not reach the question of the clarity of Congress's intent to abrogate. He concluded instead that the ADEA was not a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment and therefore any abrogation would be ineffective. Judge Cox explained that, under Section 5 of the Fourteenth Amendment, Congress "may, if circumstances warrant," do no more than "tweak procedures, find certain facts to be presumptively true, and deem conduct presumptively unconstitutional in light of Supreme Court interpretation," but in his view the ADEA exceeds the limits of that power. Pet. App. 47a-48a.

Chief Judge Hatchett dissented from the majority's disposition of the ADEA claims. He agreed with "virtually every other court that has addressed the question" that "Congress made an 'unmistakably clear' statement of its intent to abrogate." Pet. App. 18a, 20a. Chief Judge Hatchett also joined the majority of other courts in concluding "that the ADEA falls squarely within the enforce-

ment power that Section 5 of the Fourteenth Amendment confers on Congress." *Id.* at 24a. He found that Congress had prohibited age discrimination in employment because it had determined that such discrimination "was generally based on unsupported stereotypes," *id.* at 29a, and that the statutory scheme enacted by Congress was tailored to ferreting out those instances of arbitrary discrimination. *Id.* at 32a & n.12.<sup>11</sup>

### SUMMARY OF THE ARGUMENT

I. Congress clearly expressed in the text of the Age Discrimination in Employment Act its intent to abrogate the States' Eleventh Amendment immunity to private suits. By defining the terms "employer" and "employee" to include the States, Congress manifested its intent to impose the ADEA's substantive obligations on the States. The ADEA also creates a private right of action for an employee to sue his employer. And the statute incorporates an express statement that those enforcement actions can be brought against "a public agency"—specifically defined as a state government or agency—in either a "Federal or State court of competent jurisdiction." 29 U.S.C. 216(b). Absent an explicit reference to the Eleventh Amendment—which is not required—Congress could hardly have made its intent clearer. To go further, as Judge Edmondson did here, and employ the clear-statement rule to police Congress's word choices and to dictate a statute's structure would loose the clear-statement rule from its historical moorings as a rule of judicial restraint and transform it into a rule for judicial regulation of congressional syntax.

<sup>11</sup> With regard to the claim raised in *Dickson* involving the Disabilities Act, Chief Judge Hatchett and Judge Edmondson agreed that the Disabilities Act validly abrogated the States' Eleventh Amendment immunity. Pet. App. 13a-15a, 21a, 33a-41a. Respondent Florida Department of Corrections' petition for certiorari on that issue, No. 98-829, is pending.



II. The Age Discrimination in Employment Act is a proper exercise of Congress's broad and comprehensive legislative power under Section 5 of the Fourteenth Amendment to prohibit, remedy, and prevent violations of the rights secured by that Amendment. The ADEA, like many other civil rights statutes, enforces the Equal Protection Clause's guarantee against arbitrary and irrational governmental distinctions in the workplace. While classifications based on age do not receive heightened judicial scrutiny, the Equal Protection Clause authorizes judicial review of all classifications—not merely suspect or semi-suspect ones—to ensure that they are rationally related to legitimate governmental purposes. Congress's power to enforce the Clause is at least equally broad. This Court has recognized that, under Section 5, Congress has an independent and vital role in (i) evaluating the impact of state action on Fourteenth Amendment rights through the collection of empirical data, information, and expert testimony in a manner unconstrained by limitations on judicial review; (ii) measuring the empirical conclusions from such studies against the standards set by this Court for identifying constitutional violations; and (iii) legislating to prevent and remedy those constitutional violations that Congress's unique institutional capacity has exposed. That is precisely what Congress did through the ADEA, when it found, after extensive study, that age discrimination by state employers is frequently sufficiently arbitrary to violate the Constitution, and is sufficiently pervasive to require a legislative response.

The ADEA reflects a reasonably tailored means of addressing the constitutional problem Congress identified. The statute places the burden on the plaintiff to show that age was a determinative factor in the employment decision. The State may avoid liability by showing either that age was not a factor in the decision or that age is a bona fide occupational qualification. The statute is thus structured to

flush out those acts of intentional age discrimination that create the greatest risk of violating the Equal Protection Clause. In addition, the ADEA focuses narrowly on the problem of arbitrary age discrimination in employment and thus neither interferes with a State's sovereign regulatory functions nor broadly affects its operations. The ADEA also contains exemptions and imposes pre-filing notification requirements that reflect Congress's sensitivity to the federalism implications of regulating state employment practices. While the ADEA inevitably prohibits some state employment decisions that would not violate the Equal Protection Clause, in practice such disparities are not likely to be substantial. Moreover, this Court has repeatedly held that legislation aimed at deterring or remedying constitutional violations falls within the broad sweep of Congress's Section 5 power even if it prohibits conduct that is not itself unconstitutional.

### ARGUMENT

In determining whether the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, abrogates the States' Eleventh Amendment immunity to private suits in federal court, this Court "must answer two questions: 'first, whether Congress has unequivocally expresse[d] its intent to abrogate the immunity, . . . and second, whether Congress has acted pursuant to a valid exercise of power.'" *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, No. 98-531 (June 23, 1999), slip op. 6 (quoting *Seminole Tribe v. Florida*, 517 U.S. 44, 55 (1996)). The ADEA satisfies both requirements.<sup>12</sup>

<sup>12</sup> Applying this two-part test, six courts of appeals have upheld the constitutionality of the ADEA's abrogation. See *Cooper v. New York State Office of Mental Health*, 162 F.3d 770, 774-778 (2d Cir. 1998), petition for cert. pending, No. 98-1524; *Migneault v. Peck*, 158 F.3d 1131, 1136-1139 (10th Cir. 1998), petition for cert. pending, No. 98-1178; *Coger v. Board of*



# I. CONGRESS HAS UNEQUIVOCALLY EXPRESSED ITS INTENT TO ABROGATE THE STATES' ELEVENTH AMENDMENT IMMUNITY

This Court has adopted as a rule of construction the requirement that Congress make an "intention to abrogate the States' immunity unmistakably clear in the language of the statute." *Florida Prepaid*, slip op. 6 (internal quotation marks omitted). This requirement prevents courts from mistakenly expanding their own jurisdiction in a delicate area of federal-state relations.<sup>13</sup> The rule does not require Congress to mention the Eleventh Amendment or sovereign

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*Regents*, 154 F.3d 296, 301-307 (6th Cir. 1998), petition for cert. pending, No. 98-821; *Scott v. University of Miss.*, 148 F.3d 493, 501-503 (5th Cir. 1998); *Keeton v. University of Nev. Sys.*, 150 F.3d 1055, 1058 (9th Cir. 1998); *Goshtasby v. Board of Trustees*, 141 F.3d 761, 770-772 (7th Cir. 1998); see also *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694, 698-700 (1st Cir. 1983) (decided prior to *Seminole Tribe*); *Arritt v. Grisell*, 567 F.2d 1267, 1271 (4th Cir. 1977) (same). Like the Eleventh Circuit in this case, the Eighth Circuit has also found no valid abrogation of Eleventh Amendment immunity. *Humenansky v. Regents of the Univ. of Minn.*, 152 F.3d 822, 824-828 (1998), petition for cert. pending, No. 98-1235.

<sup>13</sup> See, e.g., *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990) ("the Court has adopted a particularly strict standard to evaluate claims that Congress has abrogated the States' sovereign immunity" because "States are unable directly to remedy a judicial misapprehension of that abrogation"); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) ("In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced [the matter], and intended to bring [it] into issue.") (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985) ("[I]t is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the guarantees of the Eleventh Amendment"; because "the courts themselves must decide whether their own jurisdiction has been expanded \* \* \* it is appropriate that we rely only on the clearest indications in holding that Congress has enhanced our power.").

immunity, or to incant particular words or phrases.<sup>14</sup> Nor does it require Congress to express its intent "in one place, [in] a plain declaratory statement" (Pet. App. 7a) or otherwise require Congress to structure its statement of intent in any particular fashion. See *Seminole Tribe*, 517 U.S. at 56-57 (references to States scattered throughout various statutory provisions sufficient to express clear congressional intent to abrogate); cf. *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 307 (1990) (reading venue and consent provisions together to find a clear waiver of the States' sovereign immunity). Rather, the statute need only clearly create a private cause of action against States and grant jurisdiction to federal courts to hear those claims. The ADEA does that.

It is undisputed that Congress clearly expressed its intent in the ADEA to require the States to comply with the ADEA's substantive provisions. See *EEOC v. Wyoming*, 460 U.S. 226, 243 n.18 (1983). Congress also made clear that it expected all employees or prospective employees to be able to sue employers for violations of the ADEA. Section 626(c) authorizes "any person aggrieved"—i.e., employees and job applicants—to "bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter." When an employee works for a state employer, the only possible defendant is the State. See *Lehman v. Nakshian*, 453 U.S. 156, 166 (1981) ("State and local governments were added as potential defendants by a simple expansion of the term 'employer' in the ADEA."). Nor is there any question that Congress intended suits under Section 626(c) to be heard in federal court. Section 626(c)'s grant of jurisdiction encom-

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<sup>14</sup> See *Seminole Tribe*, 517 U.S. at 56-57; *Dellmuth v. Muth*, 491 U.S. 223, 233 (1989) (Scalia, J., concurring); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 13 & n.4 (1989) (plurality), overruled by *Seminole Tribe*, *supra*; *id.* at 29-30 (Scalia, J., concurring in part and dissenting in part).

passes both federal and state courts. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991); *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 825 (1990). In extending the ADEA to the States in 1974, therefore, Congress placed States as employers squarely within an existing enforcement scheme that specifically and expressly contemplated suits by employees against employers in federal court.

This Court has held that similar statutory indicia adequately conveyed congressional intent to abrogate the States' immunity in the 1972 amendments to Title VII of the Civil Rights Act of 1964. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 449 n.2, 452 (1976). Like the 1974 amendments to the ADEA, the Title VII amendments redefined an "employer" to include "governments, governmental agencies, [and] political subdivisions," 42 U.S.C. 2000e(a), and defined "employee" in a manner that included "employees subject to the civil service laws of a State government, governmental agency or political subdivision," 42 U.S.C. 2000e(f). Also like the ADEA, Title VII provides that "a civil action may be brought against the respondent \* \* \* by the person claiming to be aggrieved." 42 U.S.C. 2000e-5(f)(1). That statutory evidence "made clear" that Title VII's cause of action "was being extended to persons aggrieved by public employers." *Fitzpatrick*, 427 U.S. at 449 n.2.

If there were any lingering doubt about congressional intent, it would be laid to rest by Section 626(b). That Section expressly incorporates a provision of the Fair Labor Standards Act of 1938 that authorizes employees to file suit "against any employer (including a public agency) in any Federal or State court of competent jurisdiction." 29 U.S.C. 216(b) (emphasis added); see also 29 U.S.C. 255(d) (tolling statute of limitations "with respect to any cause of action brought under section 216(b) of this title against a State or a political subdivision of a State in a district court of the

*United States*") (emphases added).<sup>15</sup> The "public agency" to which Section 216(b) refers is defined as "the government of a State" and any agency of a State, 29 U.S.C. 203(x). By placing in one provision the identity of the plaintiff (an employee), the defendant (a public agency employer), and the forum (federal court), Section 216(b) clearly expresses congressional intent to abrogate Eleventh Amendment immunity.<sup>16</sup>

<sup>15</sup> See also *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 167-168 (1989) ("one of the provisions the ADEA incorporates" is the portion of Section 216(b) that provides that an action "may be maintained against any employer [including a public agency] in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated"); *Lorillard v. Pons*, 434 U.S. 575, 582 (1978). The ADEA's adoption of the Fair Labor Standards Act enforcement provision by reference "make[s] it as much a part of the later act as though it had been incorporated at full length." *Engel v. Davenport*, 271 U.S. 33, 38 (1926). See also *Department of Energy v. Ohio*, 503 U.S. 607, 617 (1992).

<sup>16</sup> *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare*, 411 U.S. 279 (1973), is not to the contrary. First, Congress responded to *Employees* by amending the general enforcement provision of the Fair Labor Standards Act at issue in that case to add an express authorization for private suits in federal court against a "public agency," 29 U.S.C. 216(b). See note 9, *supra*. The ADEA expressly incorporates that authorization. 29 U.S.C. 626(b). Second, while, standing alone, Section 626(c) of the ADEA does not expressly reference public employers, the ADEA amendments of 1974 were direct and unambiguous in bringing state employers within the class of potential defendants for a preexisting federal court cause of action, unlike the more circuitous provisions at issue in *Employees*. See *Davidson v. Board of Governors*, 920 F.2d 441, 443 (7th Cir. 1990). Finally, the *Employees* Court found that "private enforcement of the [Fair Labor Standards] Act was not a paramount objective," and thus Congress would have no reason to abrogate immunity. 411 U.S. at 286. In contrast, private enforcement of the ADEA is a "vital element" in Congress's scheme to combat discrimination in the workplace. *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 358 (1995).



The contrary views of Judge Edmondson here (Pet. App. 6a-13a) and of the Eighth Circuit in *Humenansky v. Regents of the University of Minnesota*, 152 F.3d 822, 825 (1998), petition for cert. pending, No. 98-1235, rest on a misunderstanding of this Court's clear-statement rule. By insisting on an elaborate explication of congressional intent, those opinions strain to impose unnatural readings on Congress's language and insist upon "magic words" in an effort, not to discern, but to avoid Congress's clear expression of its intent. Judge Edmondson, for example, stated that "making it specific that suits can be brought in federal court does not make it more clear that suits against States by private parties in federal court are in order." Pet. App. 10a-11a n.11. But that reasoning overlooks that the ADEA authorizes suits to be brought by "any" employee against "any" employer (including a public agency)." 29 U.S.C. 216(b), 626(b) and (c)(1). The clear-statement rule is not a license to read the word "any" out of the statute. Furthermore, the reference to "public agency" appears before the statute's references to both of the designated fora, indicating that they are both available at the election of "any" employee bringing suit. Congress would have written the statute quite differently if its purpose were to allocate access to state and federal fora based upon who brought suit against which employer. In any event, Judge Edmondson's suggestion that Section 216(b) clearly expresses an intent only to allow private suits against States in state court fails to recognize that the same clear-statement rule is employed in deciding whether Congress intended to permit States to be sued in state court. See *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 205-206 (1991). If the language is

clear enough to permit suit in state courts,<sup>17</sup> the parallel statutory language is also clear enough to permit suit in federal court.

In *Humenansky*, the Eighth Circuit held that Congress's incorporation of Section 216(b) was not sufficient to abrogate Eleventh Amendment immunity for ADEA claims because Congress failed to amend Section 626(c) of the ADEA to repeat the same clear language. 152 F.3d at 825. But the most obvious reason for Congress not to amend Section 626(c) was that Congress knew that the ADEA incorporated Section 216(b) and thus saw no need to abrogate twice. *United Food & Commercial Workers Union v. Brown Group, Inc.*, 517 U.S. 544, 550 (1996) (a "natural reading of the statute's text \* \* \* always prevails over a mere suggestion to disregard or ignore duly enacted law as legislative oversight").

## II. THE AGE DISCRIMINATION IN EMPLOYMENT ACT AS APPLIED TO THE STATES IS A VALID EXERCISE OF CONGRESS'S ENFORCEMENT AUTHORITY UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT

Section 5 of the Fourteenth Amendment provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." That Section is a direct, affirmative, and independent grant of legislative power to Congress, beyond the authority embodied in Article I. *City of Boerne v. Flores*, 521 U.S. 507, 517 (1997). Like Congress's authority under the Necessary and Proper Clause, congressional authority under Section 5 encompasses all legislation reasonably designed to enforce the guarantees

<sup>17</sup> See *Alden v. Maine*, No. 98-436 (June 23, 1999), slip op. 2 (Section 216(b) "purport[s] to authorize private actions against States in their own courts").



of the Fourteenth Amendment. *Ex parte Virginia*, 100 U.S. 339, 345-346 (1880). Section 5 of the Fourteenth Amendment thus "gives Congress broad power indeed," *Saenz v. Roe*, 119 S. Ct. 1518, 1529 (1999), including the authority to abrogate Eleventh Amendment immunity, *Florida Prepaid*, slip op. 8. As applied to the States, the ADEA is appropriate Section 5 legislation because it enforces the established Fourteenth Amendment protection against arbitrary and irrational state-sponsored discrimination, and because it does so in a manner reasonably tailored to advance that interest.<sup>18</sup>

<sup>18</sup> Although Congress did not employ the words "Section 5" or "Fourteenth Amendment," its intent to exercise that authority is clear. The primary sponsor of the ADEA's extension to the States explained that "the principles underlying the[] provisions in the EEOC [Title VII] bill are directly applicable to the [ADEA]," and he specifically referenced the Senate Report on Title VII (S. Rep. No. 415, 92d Cong., 1st Sess. (1971)), which this Court later cited in *Fitzpatrick* (427 U.S. at 453 n.9) as evidence of Congress's reliance on its Section 5 power. 118 Cong. Rec. 15,895 (1972) (Sen. Bentsen). Furthermore, Congress need not "anywhere recite the words 'section 5' or 'Fourteenth Amendment' or 'equal protection.'" *Wyoming*, 460 U.S. at 243 n.18. Rather, this Court's review "of congressional legislation defended on the basis of Congress' powers under § 5 of the Fourteenth Amendment" requires only that the Court "be able to discern some legislative purpose or factual predicate that supports the exercise of that power." *Ibid.*; see *Fullilove v. Klutznick*, 448 U.S. 448, 476-478 (1980) (opinion of Burger, C.J.) (statute reflects a proper exercise of Section 5 power even though Congress never referenced that power); *id.* at 500-502 (Powell, J., concurring); see also *Union Gas Co.*, 491 U.S. at 30 (Scalia, J., concurring in part & dissenting in part) (it is not the Court's task "to enter the minds of the Members of Congress—who need have nothing in mind in order for their votes to be both lawful and effective"); *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948) ("The question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise."); *United States v. Harris*, 106 U.S. 629, 636 (1883) (when "question[ing] the power of Congress to pass the law \* \* \* [i]t is \* \* \* necessary to search the Constitution to ascertain whether or not the power is conferred").

## A. THE AGE DISCRIMINATION IN EMPLOYMENT ACT ENFORCES THE EQUAL PROTECTION CLAUSE'S BAN ON ARBITRARY AND IRRATIONAL STATE ACTION

### 1. Classifications Based On Age Are Proper Subjects For Section 5 Enforcement Legislation

a. *The Equal Protection Clause forbids arbitrary distinctions based on age.* The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws." At the core of the equal protection guarantee is the principle that, in legislating or undertaking governmental activities, a "State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985). "[C]lass legislation . . . [is] obnoxious to the prohibitions of the Fourteenth Amendment." *Romer v. Evans*, 517 U.S. 620, 635 (1996). The Equal Protection Clause thus prohibits state action predicated on "mere negative attitudes" and "vague, undifferentiated fears" (*Cleburne*, 473 U.S. at 448-449) "divorced from any factual context from which we could discern a relationship to legitimate state interests" (*Romer*, 517 U.S. at 635).

In both early and contemporary Equal Protection Clause cases, this Court has invalidated state laws and practices that reflected classifications which, although not subject to "heightened scrutiny," were too arbitrary and irrational to satisfy constitutional requirements.<sup>19</sup> The Equal Protection

<sup>19</sup> See, e.g., *Quinn v. Millsap*, 491 U.S. 95, 107 (1989); *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336, 345 (1989); *Williams v. Vermont*, 472 U.S. 14, 23 n.8 (1985); *Plyler v. Doe*, 457 U.S. 202, 222 (1982); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 438 (1982) (opinion of Blackmun, J.); *id.* at 443-444 (Powell & Rehnquist, JJ., concurring in

Clause likewise prohibits arbitrary and irrational distinctions based on age. In *Gregory v. Ashcroft*, 501 U.S. 452, 471-473 (1991), *Vance v. Bradley*, 440 U.S. 93, 98-112 (1979), and *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 314-316 (1976), this Court subjected governmental distinctions based on age—mandatory retirement limits—to scrutiny under the Equal Protection Clause. Each of those statutes survived constitutional scrutiny only because, using a mode of judicial review that is extremely deferential to actual and possible legislative justifications, the Court found that the particular laws were rationally related to the States' asserted interests—and not because distinctions based on age are categorically immune from constitutional scrutiny.<sup>20</sup> Indeed, this Court has long acknowledged that age, like race, can be used in an invidious and unconstitutional manner. See *Gulf, Colo. & Santa Fe Ry. v. Ellis*, 165 U.S. 150, 155 (1897).

b. *Age discrimination in employment is an appropriate subject for Section 5 enforcement.* Both Judge Cox (Pet. App. 48a-51a) and the Eighth Circuit in *Humenansky*, 152 F.3d at 827-828, suggested that, because distinctions based on age require only rational basis scrutiny under the Equal Protection Clause, such distinctions are not a proper subject for Section 5 enforcement legislation. But "[t]he fourteenth amendment closes with the words, 'the Congress shall have power to enforce, by appropriate legislation, the provisions of this article'—the whole of it, sir; all the provisions of the article; every section of it." Cong. Globe, 42d Cong., 1st

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judgment); *Turner v. Fouche*, 396 U.S. 346, 362-364 (1970); *Cotting v. Kansas City Stock Yards Co.*, 183 U.S. 79, 114-115 (1901); *Chicago, Milwaukee & St. Paul Ry. v. Minnesota*, 134 U.S. 418, 458 (1890).

<sup>20</sup> In fact, in *Vance*, the Court did not squarely confront a constitutional challenge to an age classification per se, but rather to the distinction between Foreign Service personnel, who faced mandatory retirement at 60, and civil service personnel, who did not. 440 U.S. at 96 n.10; see also *id.* at 95 n.2 (no claim under ADEA pursued on appeal).

Sess. App. 83 (1871) (Rep. Bingham); cf. *Oregon v. Mitchell*, 400 U.S. 112, 143-144 (1970) (Douglas, J.) ("Certainly there is not a word of limitation in § 5 which would restrict its applicability to matters of race alone."). It would be an extraordinary and unwarranted departure from both text and history to balkanize Congress's enforcement power based on legal classifications created by this Court more than a century after the constitutional text was written.

Moreover, this Court has sustained previous exercises of the enforcement power to prohibit classifications that were subject merely to rational basis scrutiny. Congress extended Title VII's ban on gender discrimination to the States in 1972, at a time when this Court had held that gender distinctions warranted only rational basis scrutiny. *Reed v. Reed*, 404 U.S. 71, 75-77 (1971). This Court upheld the 1972 abrogation as an appropriate exercise of the Section 5 power half a year before a majority of this Court ruled that gender discrimination warrants heightened scrutiny. Compare *Fitzpatrick*, 427 U.S. at 451-457, with *Craig v. Boren*, 429 U.S. 190, 197-199 (1976).<sup>21</sup> Similarly, in *Maher v. Gagne*, 448 U.S. 122 (1980), this Court ruled that Congress had validly employed its Section 5 power to abrogate Eleventh Amendment immunity for attorney's fees claims involving equal protection and due process claims that were subject only to rational basis review. *Id.* at 132; see also *Cleburne*, 473 U.S. at 439.

Any classification that is subject to judicial review for arbitrariness under the Equal Protection Clause must also

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<sup>21</sup> A year after the 1972 amendments, a plurality of this Court held that gender distinctions merited enhanced scrutiny. *Frontiero v. Richardson*, 411 U.S. 677, 682-688 (1973) (opinion of Brennan, J.). But the constitutionality of the statute did not turn upon that fact; *Fitzpatrick* cites neither *Frontiero* nor *Reed*, and omits any discussion of the applicable equal protection standard.



be subject to congressional review under Section 5; indeed, congressional power is broader, not narrower, than judicial power in this area because it includes the authority to engage in prevention, deterrence, and remediation of unconstitutional action, as well as simple prohibition of such action. "It is not said [in Section 5 that] the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. \* \* \* It is the power of Congress which has been enlarged." *Ex parte Virginia*, 100 U.S. at 345.<sup>22</sup>

c. *Congress has a special legislative competence to protect against arbitrary state action that is subject to rational basis review.* This Court applies rational basis scrutiny to most classifications, but it does not do so because of doubts that unconstitutional discrimination occurs in those areas, or that it inflicts severe harm on the victimized class. To the contrary, in *Cleburne*, *supra*, the Court applied rational basis review to invalidate zoning restrictions that discriminated against the mentally retarded, acknowledging that "there have been and will continue to be instances of discrimination against the retarded that are in fact invidious," 473 U.S. at 446, and that irrational prejudice and "mere negative attitudes" underlay the governmental action at issue, *id.* at 448.

<sup>22</sup> See also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 488 (1989) (opinion of O'Connor, J.) ("[I]n no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress" when enforcing the Fourteenth Amendment.) (citation and emphasis omitted); *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966) (Congress is "chiefly responsible for implementing the rights created in § 1 [of the Fourteenth Amendment]."); Cong. Globe, 39th Cong., 1st Sess. 2768 (1866) (Sen. Howard) (Section 5 "casts upon Congress the responsibility of seeing to it, for the future, that all the sections of the amendment are carried out in good faith.").

Rational basis scrutiny is designed, instead, to restrain the exercise of judicial power to invalidate legislation, whether enacted by state or federal legislatures. It reflects the notion that stringent judicial review is anti-democratic and should largely be reserved for the protection of those groups with limited access to the political process. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).<sup>23</sup> It would be ironic to conclude that the same legislative access that denies a group heightened scrutiny somehow disables Congress from acting.

With respect to enforcement of the Equal Protection Clause, Congress and the courts are engaged in the common endeavor of uncovering the arbitrary and irrational state action that this Court has held violates the Fourteenth Amendment. But when courts consider an equal protection challenge to legislation, they must be exceedingly deferential to the challenged legislative judgments and the factfinding that underlies them, requiring those challenging the laws to show that "the legislative facts on which the classification is apparently based could not *reasonably be conceived to be true* by the governmental decisionmaker." *Vance*, 440 U.S. at 111 (emphasis added); see also *Heller v. Doe*, 509 U.S. 312, 320-321 (1993). It is moreover, "irrelevant" to this Court's review whether the factual basis it can hypothesize "in fact underlay the legislative decision." *Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980).

By contrast, because congressional enforcement does not share either the anti-democratic character of judicial review

<sup>23</sup> See also *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314 (1993) (rational basis standard of review "is a paradigm of judicial restraint"); *Cleburne*, 473 U.S. at 441 ("courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices"); J. H. Ely, *Democracy and Distrust* 135-179 (1980).



or the limited capacity of courts to generate and compile information, Congress has "wide latitude" and a markedly different role from the courts when performing its "duty to make its own informed judgment on the meaning and force of the Constitution," *Flores*, 521 U.S. at 520, 535. Congress has a unique institutional capacity to gather information on a comprehensive basis, unconstrained by the limitations of particular litigation,<sup>24</sup> and a distinctive capacity to draw relevant information from the people and communities represented by its Members.<sup>25</sup> Accordingly, Congress, unlike the courts, is in a position to "amass and evaluate the vast amounts of data," *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985), that are essential given the heavily fact-bound character of Equal Protection Clause scrutiny. Congress can study a problem for decades (as it did here), hold fact-finding hearings (such as the 18 days of hearings that preceded enactment of the ADEA), and direct the Executive Branch to make reports on the state of a problem across the nation (see Secretary of Labor,

<sup>24</sup> *Heller*, 509 U.S. at 320 ("[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data."); *Bush v. Lucas*, 462 U.S. 367, 389 (1983) (Congress "may inform itself through fact-finding procedures such as hearings that are not available to the courts.").

<sup>25</sup> See, e.g., 118 Cong. Rec. at 7745 (Sen. Bentsen) ("Letters from my own State have revealed that State and local governments have also been guilty of discrimination toward older employees."); 113 Cong. Rec. 34,746 (1967) (Rep. Dent) ("We have long known [age discrimination] existed. We know it because we see it happening in our home districts and because we have the factual evidence supplied by commission studies, those of private groups, and our own Government."); 110 Cong. Rec. 2597-2598 (1964) (Rep. Whitener) (information gathered about age discrimination by private industry and state agency by writing letter to the state office); *id.* at 2598 (Rep. Roosevelt) ("[T]here is very definitely a problem of discrimination because of age in the United States. Our own records of our own committees show that to be a fact.").

*The Older American Worker: Age Discrimination in Employment* (1965) (Labor Report)).

The creation of national rules for the governance of our society simply does not entail the same concept of recordmaking that is appropriate to a judicial or administrative proceeding. Congress has no responsibility to confine its vision to the facts and evidence adduced by particular parties. Instead, its special attribute as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue.

*Fullilove v. Klutznick*, 448 U.S. 448, 502-503 (1980) (Powell, J., concurring); see also *South Carolina v. Katzenbach*, 383 U.S. 301, 327 (1966).

Accordingly, the full spectrum of conduct that violates the Equal Protection Clause is not exhausted by the class of governmental actions that have been proven to be unconstitutionally discriminatory in a court of law. Rather, by drawing on a broad base of knowledge and experience, Congress is able to apply this Court's definition of the equal protection right to a set of legislatively determined facts and ascertain, in a way that courts cannot, whether and how often, as an empirical matter, governmental action entails the "indiscriminate imposition of inequalities" (*Romer*, 517 U.S. at 633) or otherwise imposes "invidiously discriminatory disqualifications" on the "federal constitutional right to be considered for public service" (*Turner v. Fouché*, 396 U.S. 346, 362 (1970)).<sup>26</sup>

<sup>26</sup> To hold otherwise would "depreciate both congressional resourcefulness and congressional responsibility for implementing the [Fourteenth] Amendment" and would, contrary to this Court's rulings, consign Congress "to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the 'majestic

Moreover, unlike courts, which ordinarily proceed by making across-the-board judgments about whether a particular class is a discrete and insular minority or otherwise in need of the protection of heightened judicial scrutiny, Congress can use its superior fact-gathering capacity to identify and attack the problem of discrimination in one particular segment of American life, such as employment. Combatting discrimination in employment is an area in which Congress's legislative expertise has long been established. This Court already has recognized that the ADEA is "part of a wider statutory scheme to protect employees in the workplace nationwide" from "invidious bias in employment decisions." *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 357 (1995).<sup>27</sup> Indeed, the federal laws aimed at arbitrary discrimination in the workplace are more than a common scheme; they represent an interwoven latticework of prohibitions mutually dependent for their fulfillment on the existence of each other. The ADEA's legislative history contains numerous references to the overlap of gender and age discrimination. Congress, for example, was particularly concerned that women, whose rights in the workplace had only recently been given concrete legal recognition through the enactment of Title VII, not find that the same doors

generalities' of § 1 of the Amendment." *Katzenbach v. Morgan*, 384 U.S. 641, 648-649 (1966). Such a crabbed vision of Congress's power would suggest, for example, that Congress could not have employed its Section 5 powers to outlaw school segregation before this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). See also *Oregon*, 400 U.S. at 296 (opinion of Stewart, J.) (Congress can find invidious discrimination in state action "even though a court in an individual lawsuit might not have reached that factual conclusion").

<sup>27</sup> See also Senate Special Comm. on Aging, 95th Cong., 1st Sess., *The Next Steps in Combating Age Discrimination in Employment* 2 (Comm. Print 1977) (*The Next Steps*) ("ADEA is historically linked to title VII of the Civil Rights Act of 1964").

were once again closed due to their belated entry into the employment market or due to gender discrimination masked as an age limit.<sup>28</sup> Congress also noted the unique burden age discrimination inflicts on members of minority groups and the overlap between discrimination on the basis of disability and age.<sup>29</sup>

In sum, Congress has concluded, on a nationwide basis, that a criterion that was frequently used by government to make important employment decisions—age—in fact often represented an irrational and arbitrary outgrowth of baseless stereotypes and myths about a discrete class of people and that it unjustifiably imposed the "burden of invidiously discriminatory qualifications" on the "right to be considered

<sup>28</sup> See *The Next Steps* 15-16 ("While female unemployment, at all ages, continues to rise relative to males, the share borne by older women is especially disturbing."); S. Rep. No. 784, 92d Cong., 2d Sess. xxii (1972) ("[m]ost older individuals are women"); H.R. Rep. No. 805, 90th Cong., 1st Sess. 13-14 (1967) (Supplemental Views) (retirement of airline stewardesses); Labor Report 3; 113 Cong. Rec. at 34,743 (Rep. Mink) (discussing discrimination in the application of mandatory retirement ages for airline stewardesses and stewards); *id.* at 34,742 (Rep. Steiger) (51-year-old domestic science teacher dismissed because school "wanted a prettier, more glamorous domestic science teacher"); 110 Cong. Rec. 9912 (Sen. Smathers) ("I refer to the form of discrimination practiced against those who are getting older, particularly women. For some reason, a woman who has become a widow and who happens to be 43, 44, or 45 years of age, or older, has a most difficult time getting a position. So there is the rankest type of discrimination against women who happen to be getting along in years.").

<sup>29</sup> See S. Rep. No. 784, *supra*, at xii (noting the "multiple jeopardy" faced by older members of minority groups); *id.* at 8, 75-78 ("multiple jeopardy" faced by minority groups, such as Asian Americans and Spanish-speaking minorities, and particularly older African American women); *id.* at 116 (impact on aged African Americans); *id.* at 284 ("[A]ll of these difficulties are intensified, of course, for members of minority groups and for those who are blind or deaf or otherwise handicapped."); *id.* at 378 ("multiple jeopardy of minorities").



for public service" (*Quinn v. Millsap*, 491 U.S. 95, 105 (1989)).<sup>30</sup> Congress's Section 5 power "include[s] the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations," *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (O'Connor, J.) (emphasis in original), and congressional action in this regard properly supplements and complements the Court's case-by-case approach.<sup>31</sup> That inter-branch process—by which the Court determines what the Constitution compels in individual cases, and Congress decides what society requires as a practical matter "to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion" (*Ex parte Virginia*, 100 U.S. at 346)—is what Section 5 is all about.

<sup>30</sup> "Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker." *Radice v. New York*, 264 U.S. 292, 294 (1924); see also *Board of Educ. v. Mergens*, 496 U.S. 226, 251 (1990) ("we do not lightly second-guess such legislative judgments, particularly where the judgments are based in part on empirical determinations").

<sup>31</sup> Cf. *Frontiero*, 411 U.S. at 687-688 (plurality) ("Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the [constitutional] question presently under consideration."); *Oregon*, 400 U.S. 112 (unanimously holding that Congress could bar literacy tests nationwide in lieu of the Court's case-specific approach).

## 2. Congress Determined, On An Ample Record, That Unconstitutional Discrimination Against Older Workers Is Sufficiently Widespread To Warrant Preventive And Remedial Legislation

Congress enacted the ADEA to combat the arbitrary and irrational discrimination on the basis of age that the Fourteenth Amendment forbids. *McKennon*, 513 U.S. at 357 ("The ADEA \* \* \* reflects a societal condemnation of invidious bias in employment decisions."). The ADEA's text and legislative history are replete with expressions of Congress's intent in this regard. See 29 U.S.C. 621(a)(2), (a)(4) and (b) (ADEA designed to combat "arbitrary age limits," "arbitrary discrimination in employment because of age," and "arbitrary age discrimination in employment"). In extending the ADEA's coverage to state and local governments, both the Senate and House Reports echoed President Nixon's concerns about this national problem:

Discrimination based on age—what some people call "age-ism"—can be as great an evil in our society as discrimination based on race or religion or any other characteristic which ignores a person's unique status as an individual and treats him or her as a member of some arbitrarily-defined group. Especially in the employment field, discrimination based on age is cruel and self-defeating; it destroys the spirit of those who want to work and it denies the Nation the contribution they could make if they were working.

S. Rep. No. 690, 93d Cong., 2d Sess. 55 (1974); H.R. Rep. No. 913, 93d Cong., 2d Sess. 40 (1974).<sup>32</sup>

<sup>32</sup> See also S. Rep. No. 1487, 89th Cong., 2d Sess. 78, 80 (1966) (Additional Views) (noting problem of "[a]rbitrary and unjust age limits on hiring, imposed by employers through prejudice or misunderstanding"; emphasizing lack of basis for employers' stereotypical assumptions about



The Secretary of Labor's report on *The Older American Worker*, which contributed to the legislative momentum for age discrimination legislation, documented "substantial evidence" of "arbitrary \* \* \* discrimination based on unsupported general assumptions about the effect of age on ability." Labor Report 5; see also *id.* at 21 (noting "persistent and widespread" use of age in employment decisions that "in a great many cases can be attributed only to arbitrary discrimination against older workers on the basis of age and regardless of ability").

Further, in the course of its lengthy investigation of the problem of age discrimination, and again in connection with its consideration of the 1974, 1978, and 1986 amendments extending the ADEA's scope, substantial evidence before Congress demonstrated that "older workers were being deprived of employment on the basis of inaccurate and

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older workers); Senate Special Comm. on Aging, 93d Cong., 1st Sess., *Improving the Age Discrimination Law III* (Comm. Print 1973) (*Improving the Law*) (employment decisions "should be made on the basis of facts, not blanket assumptions"); S. Rep. No. 784, *supra*, at 144 ("attitudes on aging suitable to the 19th century cannot meet the needs of the 20th century"); *id.* at 334 ("Now large numbers of older workers are finding themselves involuntarily retired because of subtle forms, and in some cases overt acts, of age bias."); S. Rep. No. 842, 92d Cong., 2d Sess. 46 (1972) (describing efforts to "dispel[] 'preconceived notions of myths' about the older worker"); *Aid for the Aged: Message from the President of the United States*, H.R. Doc. No. 40, 90th Cong., 1st Sess. (1967) ("Many who are able and willing to work suffer the bitter rebuff of arbitrary and unjust job discrimination."); H.R. Rep. No. 1370, 87th Cong., 2d Sess. 1 (1962) (noting "the problem of continuing arbitrary employment discrimination because of \* \* \* age").

stigmatizing stereotypes." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).<sup>33</sup> Congress credited that evidence,

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<sup>33</sup> See Labor Report 7-9; H.R. Rep. No. 756, 99th Cong., 2d Sess. 6 (1986); S. Rep. No. 493, 95th Cong., 1st Sess. 4 (1977); 113 Cong. Rec. at 34,742 (Rep. Burke); *id.* at 34,752 (Rep. Dwyer); *id.* at 31,254 (Sen. Javits); 112 Cong. Rec. 20,821 (1966) (Sen. Javits) (employers' reasons for not hiring older workers "do not hold up when examined closely"); *id.* at 20,822-20,823 (Sen. Murphy) (statistics on actual performance of older workers and employer satisfaction); *id.* at 20,824 (Sen. Smathers) (same); 113 Cong. Rec. at 7076 (Sen. Javits) (noting the "wholly fallacious, yet widely held belief that older persons are unqualified"); *Employment Problems of Older Workers: Hearings on H.R. 10634 and Similar Bills Before the Select Subcomm. on Labor of the House Comm. on Educ. & Labor*, 89th Cong., 1st Sess. 26 (1965) (1965 House Hearings) (Secretary of Labor); *id.* at 65, 70-71 (Rep. Long); *id.* at 83 (Rep. Randall); *id.* at 86-87 (Rep. Cramer); *id.* at 123 (Rep. Pepper); *id.* at 127 (Rep. Pepper); *Age Discrimination in Employment: Hearings on H.R. 3651, H.R. 3768, H.R. 4221 Before the General Subcomm. on Labor of the House Comm. on Educ. & Labor*, 90th Cong., 1st Sess. 7, 13 (1967) (1967 House Hearings) (Secretary of Labor); *id.* at 45, 49, 51 (Norman Sprague, National Council on the Aging); *id.* at 66 (Peter J. Pestillo, Chamber of Commerce of the United States); *id.* at 85 (Dr. Harold L. Sheppard, Upjohn Inst. for Employment Research); *id.* at 154 (William D. Bechill, Commissioner on Aging); *id.* at 370-371 (California age discrimination study); *id.* at 416 (Kenneth A. Meiklejohn, AFL-CIO); *Age Discrimination in Employment: Hearings on S. 830, S. 788 Before the Subcomm. on Labor of the Senate Comm. on Labor & Public Welfare*, 90th Cong., 1st Sess. 34 (1967) (1967 Senate Hearings) (Sen. Murphy); *id.* at 369-370, 382-384 (report of the National Association of Manufacturers); *The Next Steps 7: Amendments to the Age Discrimination in Employment Act of 1967: Hearing on H.R. 14879, H.R. 15342 Before the Subcomm. on Equal Opportunities of the House Comm. on Educ. & Labor*, 94th Cong., 2d Sess. 76 (1976) (Jack Ossosky, National Council on the Aging); *Age Discrimination in Employment: Hearing on H.R. 2588 Before the Subcomm. on Equal Opportunities of the House Comm. on Educ. & Labor*, 94th Cong., 2d Sess. 6 (1976) (1976 House Hearings II) (Rep. Findley); *id.* at 99-107 (survey of capabilities of older workers); *Amendments to the Age Discrimination in Employment Act of 1967: Hearings on H.R. 65, H.R. 1116 Before the Subcomm. on Equal Opportunity of the House Comm. on Educ. & Labor*, 95th Cong.,

determining that, contrary to stereotypes, intelligence does not decrease with age, older workers customarily perform as well or better than younger workers, and use better judgment, are absent less often, and have fewer accidents.<sup>34</sup> The "available empirical evidence demonstrated that arbitrary age lines were in fact generally unfounded and that, as an overall matter, the performance of older workers was at least as good as that of younger workers." *Wyoming*, 460 U.S. at 231. Thus, even if "physical ability generally declines with age" (*Murgia*, 427 U.S. at 315), Congress found that it did not follow that age is a reliable predictor of ability for most jobs. "Throughout the legislative history of the ADEA, one empirical fact is repeatedly emphasized: the process of psychological and physiological degeneration caused by aging varies with each individual. \* \* \* As a result, many older American workers perform at levels equal or superior

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1st Sess. 9 (1977) (1977 House Hearings) (Rep. Pepper); *Age Discrimination in Employment Amendments of 1977: Hearings on S. 1784 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 46 (1977) (1977 Senate Hearings) (Sen. Church); *id.* at 52 (Sen. Domenici); *id.* at 66, 71 (Donald E. Elisburg, Assistant Secretary of Labor); *id.* at 137 (Rep. Findley); *id.* at 354-388 (Department of Labor Report); *Inside Views of Corporate Age Discrimination: Hearing Before the House Select Comm. on Aging*, 97th Cong., 2d Sess. 117 (1982); *Prohibition of Mandatory Retirement and Employment Rights Act of 1982: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor & Human Resources*, 97th Cong., 2d Sess. 87 (1982) (1982 Senate Hearings) (Edward Howard, National Council on Aging); *Hearing on Age Discrimination in Employment Act Amendments: Hearing Before the Subcomm. on Employment Opportunities of the House Comm. on Educ. & Labor*, 98th Cong., 2d Sess. 115 (1984) (1984 House Hearing) (Clarence Thomas, EEOC); *Working Americans: Equality at Any Age: Hearing Before the Senate Special Comm. on Aging*, 99th Cong., 2d Sess. 107 (1986) (1986 Senate Hearings) (staff report).

<sup>34</sup> See H.R. Rep. No. 756, *supra*, at 6; H.R. Rep. No. 527, 95th Cong., 1st Sess. 4 (1977); S. Rep. No. 493, *supra*, at 3.

to their younger colleagues." *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 409 (1985).

The evidence before Congress also demonstrated that many employers nevertheless continued to use age arbitrarily as a proxy for ability. Labor Report 21 ("There is persistent and widespread use of age limits in hiring that in a great many cases can be attributed only to arbitrary discrimination against older workers on the basis of age and regardless of ability." ).<sup>35</sup> The prejudice was so irrational, Congress learned, that employers would lower their performance standards rather than hire older workers.<sup>36</sup> See

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<sup>35</sup> See H.R. Rep. No. 756, *supra*, at 6-7; S. Rep. No. 493, *supra*, at 2; Labor Report 9; 1965 House Hearings 20-21 (Secretary of Labor); 1967 Senate Hearings 52 (Secretary of Labor); *Adequacy of Services for Older Workers: Hearings Before the Subcomm. on Employment & Retirement Incomes and Subcomm. on Federal, State and Community Services of the Elderly of the Senate Special Comm. on Aging*, 90th Cong., 2d Sess. 105 (1968) (Sol Swerdloff, Bureau of Labor Statistics); 1976 House Hearings II, at 73, 80 (Jack Ossofsky, National Council on Aging); 1977 Senate Hearings 90 (Marc Rosenblum, Center on Work and Aging); *id.* at 170 (Dr. Albert E. Gunn); *id.* at 334 (Department of Labor report); *The Next Steps 20-21; Hearing to Eliminate Mandatory Retirement: Hearing Before the Subcomm. on Employment Opportunities of the House Comm. on Educ. & Labor*, 97th Cong., 2d Sess. 2 (1982) (Malcolm R. Lovell, Under-Secretary of Labor); 1982 Senate Hearings 7 (Sen. Heinz); 1984 House Hearing 17-18 (Dr. Paul O. David, Institute for Human Performance); 1986 Senate Hearings 83-84 (Raymond C. Fay); *id.* at 133-140 (T. Franklin Williams, National Institute on Aging); *The Removal of Age Ceiling Cap Under The Age Discrimination in Employment Act: Joint Hearing Before the Subcomm. on Employment Opportunities of the House Educ. & Labor Comm. and the Subcomm. on Health and Long-Term Care of the House Select Comm. on Aging*, 99th Cong., 2d Sess. 43-44 (1986) (T. Franklin Williams); *id.* at 50 (American Association of Retired Persons).

<sup>36</sup> See 1965 House Hearings 21 (Secretary of Labor). Studies show that employers attribute an older worker's good performance to "unstable" factors, like luck, while crediting younger workers' good performance to ability. Conversely, bad performance is attributed to older



*Olmstead v. L.C.*, No. 98-536 (June 22, 1999), slip op. 4 (Kennedy, J., concurring) ("[T]he line between animus and stereotype is often indistinct."). Finally, Congress determined that the problem of arbitrary and irrational age discrimination pervaded employment decisionmaking across the nation.<sup>37</sup>

As a result, Members of Congress repeatedly decried the imposition of arbitrary and baseless stereotypical assumptions about older workers:

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workers' lack of ability and to younger workers' bad luck. See, e.g., E. Dedrick & G. Dobbins, *The Influence of Subordinate Age on Managerial Actions: An Attributional Analysis*, 12 J. Org. Behav. 367, 368, 374 (1991); S. Bieman-Copland & E. Ryan, *Age-Biased Interpretation of Memory Successes and Failures in Adulthood*, 53B J. Gerontology P105, P109-P110 (1998); G. Ferris et al., *The Influence of Subordinate Age on Performance Ratings and Causal Attributions*, 38 Personnel Psychol. 545, 552-553, 555 (1985); M. Kite & B. Johnson, *Attitudes Toward Older and Younger Adults: A Meta-Analysis*, 3 Psychol. & Aging 233, 240 (1988) (on the "question of whether attitudes toward older individuals are more negative than attitudes toward younger people," the answer continues to be "yes").

<sup>37</sup> See, e.g., Labor Report 7-8 (workers over 45 represent less than 45% of new hires; 20% of employers hire no older workers; half of all job openings in the private economy are closed to workers over 55 years of age; a quarter of all such job openings are closed to workers over 45); 113 Cong. Rec. at 2199 (Sen. Javits) ("The steps already taken must be extended to cover the entire Nation, so that age discrimination can be fought universally and effectively."); 112 Cong. Rec. at 20,824 (Sen. Smathers) (statistics on pervasiveness of arbitrary age discrimination); *id.*, at 20,822 (Sen. Javits) (same); 110 Cong. Rec. at 13,490 (Sen. Smathers) (same, combined with discussion of governmental discrimination); *id.* at 9911-9912 (Sen. Smathers) (pervasiveness of discrimination in private industry and federal government); *id.* at 2598 (Rep. Pucinski) ("more than one-half of the people unemployed in America today are victims of discrimination because of age"); *id.* at 2597 (Rep. Pucinski) (statistics); *id.* at 2596 (Rep. Dowdy) ("more discrimination is practiced in this area than in any other").

The widespread practice of mandatory retirement is as arbitrary, capricious, and discriminatory as a policy that dictates [that] blacks cannot be hired. To justify this practice, proponents resort to stereotypes—older workers are slower, older workers are out sick more often, older workers can't be retrained. These excuses recall the folklore of a bygone era when some said—blacks are less intelligent, women can't do men's work, and other such stereotypes used to justify previous forms of discrimination. All these stereotypes are equally false.

*Age Discrimination in Employment Amendments of 1977: Hearings on S. 1784 Before the Subcomm. on Labor of the Sen. Comm. on Human Resources*, 95th Cong., 1st Sess. 137 (1977) (Rep. Findley). Members of Congress considered the ADEA necessary to eliminate the "regrettably widespread" and "invidious" employment policies that were "rooted in past prejudices," that were "as insidious, as damaging, and as deplorable as racial or religious discrimination," and that resulted in "cruel, senseless discrimination against older people" "without establishing any actual relationship of age to job requirements."<sup>38</sup>

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<sup>38</sup> 112 Cong. Rec. at 20,821 (Sen. Javits); 113 Cong. Rec. at 31,253 (Sen. Yarborough); *id.* at 34,741 (Rep. Steiger); *id.* at 31,257 (Sen. Young); 112 Cong. Rec. at 20,825 (Sen. Cannon); see also 113 Cong. Rec. at 34,745 (Rep. Eilberg) (noting "stereotyped thinking, thoughtlessness, and prejudice about the abilities of older workers"; "unfounded age prejudice, is a most vicious, cruel, and disastrous form of inhumanity"); *id.* at 34,751 (Rep. Dwyer) (debunking "the myth" that older workers "are too settled, too hard to retrain, and have too little time left to make valuable contributions to new employers. The facts are otherwise, however."); *id.* at 34,747 (Rep. Dent) (criticizing "discrimination which is the result of a deliberate disregard of a worker's value solely because of age"); *id.* at 34,746 (Rep. Daniels) (noting "the frequently unfair and unjustifiable attitudes of many employers against hiring anyone over age 40"); *id.* at 34,744 (Rep.



Congress further found that, whereas chronological age is a poor indicator of job performance, analytical tools are generally available to evaluate worker competence on a case-by-case basis, thus eliminating the need for most employers to use the unreliable proxy of age as a measurement of ability.<sup>39</sup>

Evidence before Congress demonstrated, moreover, that States as employers were not immune to the "age dis-

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Pucinski) (objecting to "arbitrary discrimination" based on "old beliefs and myths that have been proved untrue"); *id.* at 31,254 (Sen. Javits) ("almost all" age discrimination "was completely arbitrary"; "a great deal of the problem stems from pure ignorance: there is simply a widespread irrational belief that once men and women are past a certain age they are no longer capable of performing even some of the most routine jobs"); *id.* at 7076-7077 (Sen. Javits) (national "cult" of youth results in "wholly irrational barriers to employment"); 112 Cong. Rec. at 20,822 (Sen. Javits) (noting lack of empirical basis for assumptions about older workers' abilities); *id.* at 20,824 (Sen. Smathers) (same); 110 Cong. Rec. at 13,491 (Sen. Long) ("[T]his is one of the worst and rankest forms of discrimination."); *ibid.* (Sen. Gore) ("the largest numbers who are suffering the most crushing form of discrimination are suffering it because of age"); *id.* at 13,490 (Sen. Smathers) ("I can establish that there is more discrimination in this area, without basis and without justification, than in any other area. That is discrimination with respect to age."); *id.* at 9912 (Sen. Sparkman) ("[I]f there is discrimination in employment in this country, none is more blatant than discrimination because of age."); *id.* at 2597 (Rep. Whitener) (similar).

<sup>39</sup> See, e.g., H.R. Rep. No. 527, *supra*, at 3; 1965 House Hearings 58-59 (Sen. Javits); 1967 Senate Hearings 347-348 (report of the National Association of Manufacturers); *Economics of Aging: Toward A Full Share in Abundance: Hearings Before the Senate Special Comm. on Aging*, 91st Cong., 1st Sess. 1272-1291 (1969) (Dr. Leon Koyl); 1976 House Hearings II, at 81 (Jack Ossofsky, National Council on Aging); 1977 House Hearings 65 (Rep. Findley); *id.* at 8, 46 (Rep. Pepper); 1977 Senate Hearings 100-101 (Dr. Michael D. Batten); *id.* at 139 (Rep. Findley); House Select Comm. on Aging, 95th Cong., 1st Sess., *Mandatory Retirement: The Social and Human Cost of Enforced Idleness* 34-35 (Comm. Print 1977); 1982 Senate Hearings 8 (Sen. Heinz); *id.* at 86-87 (Edward F. Howard, National Council on the Aging).

crimination [that] is deeply ingrained in the American system," 118 Cong. Rec. at 24,397 (Sen. Bentsen). In fact, "Congress \* \* \* established that [those] same conditions existed in the public sector." *Goshtasby v. Board of Trustees*, 141 F.3d 761, 772 (7th Cir. 1998). Senator Bentsen, the author of the amendment to extend the ADEA to the States, noted the "mounting evidence" that "the hiring and firing practices of governmental units discriminate against the elderly." 118 Cong. Rec. at 7745. Specifically, he noted that the evidence "revealed that State and local governments have also been guilty of discrimination toward older employees." *Ibid.*<sup>40</sup> The legislative record thus makes clear

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<sup>40</sup> See *Improving the Law* 14 ("There is also evidence that, like the corporate world, government managers also create an environment where young is somehow better than old."); S. Rep. No. 846, 93d Cong., 2d Sess. 112 (1974) (same); S. Rep. No. 300, 93d Cong., 1st Sess. 57 (1973) (expanding ADEA "will remove discriminatory barriers against employment of older workers in government jobs at the Federal and local government levels as it has and continues to do in private employment"); S. Rep. No. 690, *supra*, at 56 (same); H.R. Rep. No. 913, *supra*, at 40-41 (same); S. Rep. No. 842, *supra*, at 46 (same); 118 Cong. Rec. at 7745 (Sen. Bentsen) ("[T]he pressures directed against older Government employees constitute flagrant examples of age discrimination in employment, and as such, they should be outlawed."); 113 Cong. Rec. at 34,742 (Rep. Steiger) (school board refused to renew contract of a 51-year-old teacher "apparently because they wanted a prettier, more glamorous domestic science teacher"); *id.* at 34,749 (Rep. Donohue) ("Government itself feels that those citizens entering middle age are too old to begin any new employment."); 1967 House Hearings 168 (report of age discrimination in California public agencies that shows agencies using age in violation of state law and hiring authorities expressing doubts about the physical and mental capacities of older workers); 110 Cong. Rec. at 2596 (Rep. Beckworth) ("[T]he Government itself is a difficult place for an older man to obtain employment."); *id.* at 9912 (Sen. Sparkman) ("[A] person who is 40 or 45 years old finds it almost impossible to get a job, either in the Government or in private industry."); *id.* at 13,490 (Sen. Smathers) ("[E]ven the Federal Government itself and many State governments \* \* \* say, 'We

that Congress found that the "invidious," "wholly irrational," "unjustifiable," and "completely arbitrary" myths and false stereotypes about older workers (see note 38, *supra*) pervading the private sector also infected state governments.

Even apart from the direct evidence of state discrimination it identified, Congress also could reasonably have concluded that state governments were not immune to the "pervasive discrimination against the elderly" (*Johnson v. Mayor & City of Baltimore*, 472 U.S. 353, 369 (1985)) that Congress found in private industry and the federal government.<sup>41</sup> Thus, the legislative record amply provides "a factual basis on which Congress could have concluded that [government employers were engaging in] 'invidious discrimination in violation of the Equal Protection Clause.'"

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do not take on anyone who has reached the age of 35 or 45.'"). In addition, State officials reinforced and built upon the age biases of private employers. Representative Whitener described a state employment security commission that denied unemployment benefits to older workers by deeming such workers unavailable for work solely because the local industry imposed arbitrary age limits on hiring. 110 Cong. Rec. at 2597.

<sup>41</sup> For evidence of the widespread scope of the age-discrimination problem, see note 37, *supra*. Congress later determined, based on reports that government employers were increasingly identified as violators of the ADEA, that "not all governmental bodies are model employers." *The Next Steps* 7; see also A. Hopkins, *Perceptions of Employment Discrimination in the Public Sector*, 40 Pub. Admin. Rev. 131, 132-133 (1980) (12% of all public employees, and 17% of public employees over 50 years old, reported age discrimination on the job); cf. *Jefferson County Pharm. Ass'n v. Abbott Lab.*, 460 U.S. 150, 158 (1983) ("economic choices made by public corporations \* \* \* are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders").

*Flores*, 521 U.S. at 528 (describing and quoting *Morgan*, 384 U.S. at 656).<sup>42</sup>

Congress's factual determination, after such lengthy study and deliberation, regarding the scope and extent of the problem of irrational and arbitrary age discrimination in general and as perpetrated by state actors is "entitled to much deference," *Flores*, 521 U.S. at 536. Because Congress bears primary responsibility for enforcing the Fourteenth Amendment, "significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it" (*United States v. Gainey*, 380 U.S. 63, 67 (1965)).

#### **B. THE AGE DISCRIMINATION IN EMPLOYMENT ACT IS REASONABLY TAILORED TO THE ELIMINATION OF UNCONSTITUTIONAL AGE DISCRIMINATION**

When enacting Section 5 legislation, Congress "must tailor its legislative scheme to remedying or preventing" the unconstitutional conduct it has identified. *Florida Prepaid*, slip op. 10. In applying this standard, however, it must be remembered that Section 5 allows Congress to "paint with a much broader brush than may this Court, which must confine itself to the judicial function of deciding individual cases and controversies upon individual records." *Fullilove*,

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<sup>42</sup> See also *Croson*, 488 U.S. at 489 (opinion of O'Connor, J.) ("The degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of the governmental body."); *Fullilove*, 448 U.S. at 503 (Powell, J.) ("One appropriate source [of evidence for Congress] is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation. After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area.").



448 U.S. at 501 n.3. Section 5 thus affords Congress broad discretion to determine "what legislation is needed to secure the guarantees of the Fourteenth Amendment, and its conclusions are entitled to much deference." *Flores*, 521 U.S. at 536. Once Congress has properly identified a problem of constitutional dimension, moreover, "in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." *Fullilove*, 448 U.S. at 483 (opinion of Burger, C.J.). Further, the "wide latitude" that Section 5 affords Congress permits it to prohibit activities that are not themselves unconstitutional in furtherance of its remedial and deterrent scheme. *Flores*, 521 U.S. at 518, 520, 525-527, 532. Ultimately, judicial scrutiny of congressional action under Section 5 is as deferential as it is under Article I:

Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

*Ex parte Virginia*, 100 U.S. at 345-346.<sup>43</sup>

1. Congress carefully structured the ADEA, like other civil rights legislation in the employment arena, to expose and prevent arbitrary and irrational discrimination.

The ADEA, like Title VII, is not a general regulation of the workplace but a law which prohibits discrimination.

<sup>43</sup> See also *Flores*, 521 U.S. at 517-518; cf. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

The statute does not constrain employers from exercising significant other prerogatives and discretions in the course of the hiring, promoting, and discharging of their employees.

*McKennon*, 513 U.S. at 361.<sup>44</sup> Thus, the ADEA does not flatly prohibit the use of age in employment decisions; it just forbids States, like all other employers, including the federal government, from treating qualified older workers differently solely because they are viewed as "old."

To that end, the ADEA requires the plaintiff to identify a prohibited use of age, and then permits the employer to show either that age was a reasonably necessary consideration in the circumstances of the particular job or that the employer, in fact, relied on a reasonable factor other than age (29 U.S.C. 623(f)(1)); see also *Wyoming*, 460 U.S. at 229.<sup>45</sup> Liability for the disparate treatment will not attach unless age "actually motivated" the employer's decision.

<sup>44</sup> 1967 Senate Hearings 37 (Secretary of Labor) ("The relevant inquiry" is whether the ADEA "permits administrative distinction between cases where there is good and sufficient reason for adjusting the incidents of a person's employment to his age and those cases where there is not \* \* \*. This bill is drawn with close attention to this key distinction."); see also 1984 House Hearing 113 (Clarence Thomas, EEOC) ("The ADEA does not interfere with a state or local government's ability to prescribe reasonable qualifications for [employees] or to discharge those individuals unfit to perform adequately. \* \* \* What the Act forbids is arbitrary age distinctions based on stereotyped assumptions rather than analysis or determinations based on individual merit.").

<sup>45</sup> This Court has left open the question whether the ADEA also prohibits actions with a discriminatory impact. *Hazen Paper*, 507 U.S. at 610. That issue of statutory construction was not raised in the questions presented by the petitions and no cross-petition was filed raising it. The EEOC has taken the view that the ADEA does prohibit some practices that have an adverse impact on older workers and that are not justified by business necessity. 29 C.F.R. 1625.7(d); cf. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 432 (1971).



*Hazen Paper*, 507 U.S. at 610. That standard permits a state employer to "assess the fitness of its [employees] and dismiss those \* \* \* whom it reasonably finds to be unfit." *Wyoming*, 460 U.S. at 239. Thus, under the ADEA's enforcement scheme, "[t]he employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly." *Hazen Paper*, 507 U.S. at 611. Having determined that most older workers are capable of continuing in their jobs, that the use of age as a proxy for worker ability often has been based on factually incorrect stereotypes and myths, and that tools are generally available to employers to measure worker capability directly without undue burden, Congress reasonably concluded that, in the absence of direct proof of age's relevance, a substantial risk would persist that age classifications would be based upon the arbitrary, baseless, or invidious stereotypes that the Constitution condemns.

Furthermore, given that at least 49 States have prohibited the use of age as a proxy for ability in most public employment decisions,<sup>46</sup> the ADEA has at most a minimal

<sup>46</sup> See Alaska Stat. § 18.80.300(4) (Michie 1996); Ariz. Rev. Stat. Ann. § 41-1461(6) (West 1999); Ark. Code Ann. §§ 12-3501, 21-3-201 (Michie 1996); Cal. Gov't Code § 12926(d) (West Supp. 1999); Colo. Rev. Stat. § 24-34-401(3) (1998); Conn. Gen. Stat. §§ 46a-51(10), 46a-70(a) (1998); Del. Code Ann. tit. 19, § 710(3) (Supp. 1998); Fla. Stat. Ann. § 112.044(2)(a) (West 1992); Fla. Stat. Ann. § 760.02(6) (West 1997); Ga. Code Ann. § 45-19-22(5) (1990); Haw. Rev. Stat. § 378-1 (1993); Idaho Code § 67-5902(6)(b) (1998); 775 Ill. Comp. Stat. 5/2-101(B)(1)(c) (West 1993); Ind. Code Ann. § 22-9-2-1 (Michie 1997) (defining "employer" to include the State and all other governmental entities, but excluding from the definition "a person or governmental entity which is subject to the federal Age Discrimination in Employment Act"); Iowa Code Ann. § 216.2(7) (West 1994); Kan. Stat. Ann. § 44-1112(d) (1993); Ky. Rev. Stat. Ann. § 344.010(1) (Michie 1997); La. Rev. Stat. Ann. § 23-311(B) (West 1998); Me. Rev. Stat. Ann. tit. 5, § 4553(7) (West 1989); Md. Code Ann., Lab. & Empl. § 49B-15(b) (1998);

impact on legitimate state operations and decisionmaking.<sup>47</sup> Because the States have largely abolished mandatory retirement ages and other across-the-board uses of age in most employment matters, the ADEA no longer conflicts with an asserted state interest in avoiding individualized determina-

Mass. Gen. Laws ch. 151, § 151B-4(1C) (1989); Mich. Comp. Laws Ann. § 37.2103(g) (West Supp. 1999); Minn. Stat. Ann. § 363.01(28) (West 1991); Miss. Code Ann. § 25-9-149 (1999); Mo. Ann. Stat. § 213.010(7) (West Supp. 1999); Mont. Code Ann. § 49-3-101(4) (1997); Neb. Rev. Stat. § 48-1002(2) (1993); Nev. Rev. Stat. § 613.310(5) (1997); N.H. Rev. Stat. Ann. § 354-A:2(VII) (1997); N.J. Stat. Ann. §§ 10:3-1, 10:5-5(e) (West 1993); N.M. Stat. Ann. § 28-1-2(A) (Michie 1996); N.Y. Exec. Law § 296(3-a)(f) (McKinney 1993); N.C. Gen. Stat. § 126-16 (1999); N.D. Cent. Code § 14-02.4-02(5) (1997); Ohio Rev. Code Ann. § 4112.01(A)(2) (Anderson 1998); Okla. Stat. tit. 25, § 1201(5) (1987); Or. Rev. Stat. § 659.010(6) (1997); 43 Pa. Cons. Stat. Ann. § 954(b) (West 1991); R.I. Gen. Laws §§ 28-5-6(6), 28-5-7.1 (1995); S.C. Code Ann. § 1-13-30(d) (Law. Co-op. 1986); S.D. Codified Laws § 20-13-1(11) (Michie 1995); Tenn. Code Ann. § 4-21-102(4) (1998); Tex. Lab. Code Ann. §§ 21.002(7), 21.126 (West 1996); Utah Code Ann. § 34A-5-102(7)(a) (1997); Vt. Stat. Ann. tit. 21, § 495d(1) (Supp. 1998); Va. Code Ann. § 2.1-116.06 (Michie Supp. 1998); Wash. Rev. Code § 49.60.040(1) (1994); W. Va. Code § 5-11-3(d) (Supp. 1998); Wis. Stat. Ann. § 111.32(6)(a) (West 1997); Wyo. Stat. Ann. § 27-9-102(b) (Michie 1991). The possible exception is Alabama, whose age discrimination law does not indicate whether the covered "employers" include governmental units. Ala. Code § 25-1-20(2) (Michie Supp. 1998). The Alabama State Personnel Board, however, has prohibited "[d]iscrimination against any person in recruitment, examination, appointment, training, promotion, retention or any other personnel action, because of \* \* \* age \* \* \* or any other non-merit factor." Ala. Admin. Code r. 670-X-4.1 (Supp. 1990). This regulation has "the force and effect of law," Ala. Code § 36-26-9 (Michie 1991), and the Board's enforcement decisions may be reviewed in the state courts, see *Thompson v. Alabama Dep't of Mental Health*, 477 So. 2d 427 (Ala. Civ. App. 1985).

<sup>47</sup> *Wyoming*, 460 U.S. at 253 (Burger, C.J., dissenting) ("To decide whether a challenged activity is an attribute of sovereignty, it is instructive to inquire whether other government entities have attempted to enact similar legislation.").

tions, such as this Court sought to protect in *Murgia*, *Vance*, and *Gregory*. The practice now challenged in most ADEA cases (including at least two of the instant cases and most of the cases cited in note 12, *supra*) is the unauthorized use of age as part of an ad hoc, individualized assessment by an employer. Cf. *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336, 344 n.4 (1989) (suggesting that an "aberrational" policy of assessor contrary to state law is not entitled to same measure of constitutional deference). Arbitrary uses of age as a deciding factor by a public employer raise serious equal protection concerns independent of the ADEA.<sup>48</sup> The ADEA accordingly imposes few new constraints on the States' employment practices. Moreover, it does not at all prevent the States from engaging in any regulatory function on behalf of their citizens, or in any other primary conduct constitutionally reserved to the States. The State's "discretion to achieve its goals in the way it thinks best is not being overridden entirely, but is merely being tested against a reasonable federal standard." *Wyoming*, 460 U.S. at 240 (emphasis in original).<sup>49</sup>

2. The ADEA's procedural and remedial provisions are also tailored. The Act does not regulate all state activities—only employment. The remedies the ADEA allows for a proven violation narrowly focus on "restor[ing] the employee to the position he or she would have been in absent the discrimination." *McKennon*, 513 U.S. at 362. ADEA relief is thus confined to back pay (doubled if the violation was

<sup>48</sup> See *Logan*, 455 U.S. at 438 (opinion of Blackmun, J.); *id.* at 443-444 (Powell & Rehnquist, JJ., concurring in judgment); *Gulf*, 165 U.S. at 159 ("But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this.").

<sup>49</sup> See also *Wyoming*, 460 U.S. at 241 ("In this case, we cannot conclude from the nature of the ADEA that it will have either a direct or an obvious negative effect on state finances.").

"willful"), injunctive, and other equitable relief, see 29 U.S.C. 626(b).<sup>50</sup>

Furthermore, the ADEA manifests a respect for States by requiring that state age discrimination remedies be invoked (29 U.S.C. 633(b)) and that the EEOC be afforded the opportunity to address any alleged problem through voluntary conciliation (29 U.S.C. 626(d)). The ADEA thus ensures that the State is given the opportunity to resolve the problem, under its own law or otherwise, before being haled into federal court. See *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755-757 (1979).

In addition, Congress legislated in a manner that minimizes the intrusiveness of the ADEA on the States' sovereign functions. The ADEA excludes from its protection any person not subject to the civil service laws of a state government who (1) is elected to public office in any State or political subdivision of any State by the qualified voters thereof; (2) is chosen by such officer to be on such officer's personal staff; (3) is an appointee on the policymaking level; or (4) is an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. 29 U.S.C. 630(f). Those exemptions embody a congressional decision not to regulate the qualifications of a State's "most important government officials" because those are "decision[s] of the most fundamental sort for a sovereign entity" that raise special federalism concerns. *Gregory*, 501 U.S. at 463, 440.

The ADEA currently permits state employers to establish mandatory retirement ages for "firefighter[s] or law enforce-

<sup>50</sup> Although the ADEA authorizes all "legal or equitable relief as may be appropriate," 29 U.S.C. 626(b), "the Courts of Appeals have unanimously held \* \* \* that the ADEA does not permit \* \* \* compensatory damages for pain and suffering or emotional distress." *Commissioner v. Schleier*, 515 U.S. 323, 326 (1995).



ment officer[s]" who are 55 or older.<sup>51</sup> 29 U.S.C. 623(j)(1)(B) (Supp. III 1997); see also *ibid.* note (Study and Guidelines for Performance Tests). In addition, the EEOC has exercised its administrative authority, 29 U.S.C. 628, to exempt entirely from the ADEA programs and activities carried out by state employers designed exclusively to provide or promote the employment of persons with special employment problems, such as the long-term unemployed, people with disabilities, or members of minority groups, 29 C.F.R. 1627.16(a).

3. Despite Congress's careful and studied efforts to tailor the statute, in some instances the ADEA may prohibit conduct that is not itself unconstitutional. It is not at all clear, however, precisely how much more disparate treatment by the States the ADEA prohibits than the Constitution already proscribes of its own force. The Constitution requires age distinctions to be rational, and the ADEA requires that employment decisions based on age be "reasonably necessary," 29 U.S.C. 623(f)(1). See generally *Criswell*, 472 U.S. at 407-408; see also 29 C.F.R. 1625.6.

While it is certainly possible to conceive of an age-based state employment policy that is "rational" but not "reasonably necessary," such policies cannot be prevalent because every State has by legislation disclaimed any interest in using age as an easy-to-administer line for most employment

<sup>51</sup> Mandatory retirement ages of less than 55 are permissible if they were in effect on March 3, 1983. See 29 U.S.C. 623(j)(1)(A). Thus, as an illustration of the ADEA's tailored coverage, each of the employee groups (law enforcement officers, judges, and Foreign Service Officers) for which this Court found that the Fourteenth Amendment did not constitutionally proscribe mandatory retirement (see *Murgia*, *Gregory*, and *Vance*) is also exempted from the ADEA's ban on mandatory retirement ages. See *Gregory*, 501 U.S. at 470; *Vance*, 440 U.S. at 97 n.12; *Strawberry v. Albright*, 111 F.3d 943, 947 (D.C. Cir. 1997), cert. denied, 522 U.S. 1147 (1998).

decisions. See note 46, *supra*. The EEOC advises that most claims of age discrimination today involve not general policies based on age, but rather ad hoc, individualized employment decisions, in which the employer contends not that the use of age was justified, but that age was not the basis of decision. If a court determines, nonetheless, that age in fact motivated a state employer's decision, then, because no justification for the use of age has been offered, the decision will ordinarily violate both the ADEA and the Constitution. Indeed, it will most often violate state law as well, though as Congress found—based in part on the testimony of state officials themselves—state laws have often been ineffective due to lack of resources and enforcement capability.<sup>52</sup> Thus, the ADEA does not necessarily impose extensive new restraints on the States that are not already imposed by the Constitution and their own laws.

Some of the ADEA's overinclusiveness, moreover, is the inevitable consequence of Congress's attempt to fill the gap between real-world discrimination and an individual plaintiff's capacity to prove it in court by shifting burdens of proof. This mechanism for enforcing constitutional rights has been adopted by Congress not only in the area of employment discrimination (see, e.g., *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.8 (1981) ("In a Title VII case, the allocation of burdens \* \* \* sharpen[s]

<sup>52</sup> Labor Report 10 ("inadequate funds and staff have limited the effectiveness of these laws in most States"), 22; *Improving the Law* 9; S. Rep. No. 1487, *supra*, at 78; 113 Cong. Rec. at 2199 (Sen. Javits); *id.* at 34,743 (Rep. Matsunaga) ("absence of uniformity"); 118 Cong. Rec. at 24,397 (Sen. Bentsen); 1967 House Hearings 168 (report of age discrimination in California public agencies that shows agencies using age in violation of state law). For precisely that reason, many state officials supported the enactment of national age discrimination legislation to reinforce their own efforts. See H.R. Rep. No. 805, *supra*, at 3; *Improving the Law* 9.



the inquiry into the elusive factual question of intentional discrimination.")), but also in the area of voting rights (see, e.g., *City of Rome v. United States*, 446 U.S. 156, 174 (1980)). And it has been upheld as an appropriate use of the Section 5 enforcement power. See generally, e.g., *Lopez v. Monterey County*, 119 S. Ct. 693, 703 (1999) ("[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional") (quoting *Flores*, 521 U.S. at 518); cf. *Fitzpatrick*, 472 U.S. at 451-457.

Congress, moreover, has carefully confined its prohibition of age discrimination to an area of vital concern and importance to the affected individuals—their ability to earn a living and thus to subsist<sup>53</sup> and their "federal constitutional right to be considered for public service" free from arbitrary discrimination, *Turner*, 396 U.S. at 362; see also *Quinn*, 491 U.S. at 104-105; *Wieman v. Updegraff*, 344 U.S. 183, 192 (1952) ("[C]onstitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory."). Congress thus focused the ADEA on an area in which state discretion is already constrained by distinct constitutional and state statutory rights of the individual.<sup>54</sup>

<sup>53</sup> This Court has long recognized that the "right to work for the support of themselves and families" is a fundamental component of the liberty guaranteed by the Fourteenth Amendment. See *Smith v. Texas*, 233 U.S. 630, 636 (1914) ("In so far as a man is deprived of the right to labor, his liberty is restricted \* \* \* and he is denied the protection which the law affords those who are permitted to work. Liberty means more than freedom from servitude, and the constitutional guarantee is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling.").

<sup>54</sup> Contrast *Flores*, 521 U.S. at 532 (the Religious Freedom Restoration Act's (42 U.S.C. 2000bb *et seq.*) "[s]weeping coverage ensure[d] its intru-

Finally, Congress has acted in a context in which the consequences of unconstitutional state action have a direct impact on federal operations and the federal fisc. See *Wyoming*, 460 U.S. at 231 ("arbitrary age discrimination \* \* \* deprive[s] the national economy of the productive labor of millions of individuals and impose[s] on the governmental treasury substantially increased costs in unemployment insurance and federal Social Security benefits"); Labor Report 18. The fact that any unconstitutional state conduct reverberates far beyond the State's borders and is intertwined with independent federal governmental interests both diminishes the legitimate state objections to the statute's protective operation and underscores the proportionality of Congress's limited remedial action in the ADEA.

In sum, the ADEA provides a discrete and calibrated remedy to a narrowly defined range of governmental conduct. It reflects a measured and proportionate response to a constitutional problem that Congress identified through a decades-long process of extensive study, application of this Court's equal protection standard to expert and thoroughly documented legislative factual judgments, and consultation and dialogue with the States. This studiously constructed statute falls well within the "wide latitude" (*Flores*, 521 U.S. at 520) afforded Congress when it exercises its "comprehensive remedial power" (*Fullilove*, 448 U.S. at 483) under Section 5 of the Fourteenth Amendment.

sion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter"); see also *Florida Prepaid*, slip op. 18 (patent legislation applies to an "unlimited range of state conduct").

**CONCLUSION**

The judgments of the court of appeals should be reversed,  
and the cases remanded for further proceedings.

Respectfully submitted.

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IN THE  
**Supreme Court of the United States**

J. DANIEL KIMEL, JR., *et al.*,  
v. *Petitioners,*

STATE OF FLORIDA BOARD OF REGENTS, *et al.*,  
*Respondents.*

UNITED STATES OF AMERICA,  
v. *Petitioner,*

FLORIDA BOARD OF REGENTS, *et al.*,  
*Respondents.*

On Writs of Certiorari to the  
United States Court of Appeals  
for the Eleventh Circuit

**BRIEF FOR PETITIONERS**  
**J. DANIEL KIMEL, JR., *ET AL.***

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**QUESTION PRESENTED**

Whether the Eleventh Amendment bars a private suit in federal court against a State for violation of the Age Discrimination in Employment Act.

## PARTIES

Petitioners in No. 98-791 were the plaintiffs in three separate cases which were consolidated for argument and decision by the Court of Appeals:

Burton H. Altman, Robert W. Beard, Vandall K. Brock, John D. Calman, Elaine D. Cancalon, Siwo De Kloet, Joseph F. Donoghue, Ralph C. Dougherty, Phillip E. Downs, Richard M. Dunham, Robert L. Fulton, Alice C. Gaar, Richard E. Glick, Bruce T. Grindal, William H. Heard, Richard L. Iverson, Herman G. James, Jr., J. Daniel Kimel, Jr., Philip Lazarus, William E. Leparulo, Winston W. Lo, Deborah B. Maher, Richard N. Mariscal, Ronald W. Martin, Charles G. MacDonald, Robert R. Mead-Donaldson, Connie G. Morris, Sharon E. Nicholson, Lucia Patrick, Joseph J. Pettigrew, Jr., John R. Quine, Katherine M. Shelfer, Jerome H. Stern, Richard P. Sugg, Charles W. Swain, and Edward D. Wynot, Jr., plaintiffs-appellees in *Kimel v. Florida Board of Regents*, No. 96-2788 (11th Cir.).

Wellington N. Dickson, plaintiff-appellee in *Dickson v. Florida Department of Corrections*, No. 96-3773 (11th Cir.).

Roderick MacPherson and Marvin Narv, plaintiffs-appellants in *MacPherson v. University of Montevallo*, No. 96-6947 (11th Cir.).

The petitioner in No. 98-796 is the United States. The United States also is a respondent in No. 98-791.

The other Respondents in both cases are the Board of Regents of the State of Florida, defendant-appellant in *Kimel v. Florida Board of Regents*; Florida Department of Corrections, Jackson County, defendant-appellant in *Dickson v. Florida Department of Corrections*; and the University of Montevallo, defendant-appellee in *MacPherson v. University of Montevallo*.

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BRIEF FOR PETITIONERS  
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OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 139 F.3d 1426, and is reprinted in the Appendix to the Petition for Certiorari in No. 98-791 ("Pet. App.") at 1a. The opinion of the United States District Court for the Northern District of Florida in *Kimel v. State of Florida Board of Regents* is unreported and is reprinted at Pet. App. 51a. The opinion of the United States District Court for the Northern District of Florida in *Dickson v. Florida Department of Corrections* is unreported and is reprinted at Pet. App. 57a. The opinion of the United States District Court for the Northern District of Alabama in *MacPherson v. University of*



*Montevallo* is reported at 938 F. Supp. 785, and is reprinted at Pet. App. 61a.

### JURISDICTION

The panel opinion of the Court of Appeals was issued on April 30, 1998. Timely petitions for rehearing and suggestions for rehearing *en banc* were denied on August 17, 1998. Pet. App. 70a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides as follows:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subject of any Foreign State.

The Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:

Section 1. No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

\* \* \* \*

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The Age Discrimination in Employment Act is codified at 29 U.S.C. §§ 621-634, and is reprinted at Pet. App. 73a-107a.

### STATEMENT OF THE CASE

Petitioners are plaintiffs in three otherwise unrelated federal lawsuits, consolidated for decision in the Court of Appeals, each of which alleges, *inter alia*, that the plaintiffs' employers—agencies of State governments—discriminated against them on the basis of age in violation of the

Age Discrimination in Employment Act ("ADEA" or the Act"), 29 U.S.C. § 623.<sup>1</sup>

### 1. Statutory Framework

"The ADEA, enacted in 1967 as part of an ongoing congressional effort to eradicate discrimination in the workplace, reflects a societal condemnation of invidious bias in employment decisions." *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 357 (1995). Designed to combat "pervasive discrimination against the elderly," *Johnson v. Mayor and City of Baltimore*, 472 U.S. 361, 369 (1985), stemming from "inaccurate and stigmatizing stereotypes," *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993), "[t]he ADEA broadly prohibits arbitrary discrimination in the workplace based on age." *Lorillard v. Pons*, 434 U.S. 575, 577 (1978). See also *EEOC v. Wyoming*, 460 U.S. 226, 231 (1983).

The core provisions of the statute make it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age," § 4(a)(1), 29 U.S.C. § 623(a)(1), or "to limit, segregate, or classify . . . employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of [his] age," § 4(a)(2), 29 U.S.C. § 623(a)(2).<sup>2</sup>

<sup>1</sup> The three suits are *J. Daniel Kimel, Jr., et al. v. Florida Board of Regents*, N.D. Fla. No. TCA 95-40194 MMP ("Kimel"); *Wellington N. Dickson v. Florida Department of Corrections, et al.*, N.D. Fla. No. 5:96cv207-RH ("Dickson"), and *Roderick MacPherson, et al. v. University of Montevallo*, N.D. Ala. No. 94-AR-2962-5 ("MacPherson").

<sup>2</sup> The ADEA also makes it unlawful to discriminate against an individual for having opposed practices made unlawful by, or for

The Act makes several exceptions to those basic prohibitions. An action "otherwise prohibited" by the ADEA is lawful "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age." Section 4(f)(1), 29 U.S.C. § 623(f)(1). Nor does anything in the Act prevent an employer from "discharg[ing] or otherwise disciplin[ing] an individual for good cause," § 4(f)(3), 29 U.S.C. § 623(f)(3), or from "observ[ing] the terms of a bona fide seniority system that is not intended to evade the purposes of [the Act]," except to the extent that such a plan requires involuntary retirement because of age, § 4(f)(2)(A), 29 U.S.C. § 623(f)(2)(A).

The Act also expressly permits employers to differentiate between employees on the basis of age in "observ[ing] the terms of a bona fide employee benefit plan," as long as the distinctions are justified by cost or are made pursuant to "a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of [the Act]." Section 4(f)(2)(B), 29 U.S.C. § 623(f)(2)(B). Many practices that differentiate on the basis of age in connection with pension benefits, retiree health benefits, and severance pay also are expressly allowed by the Act. See § 4(i), (l), 29 U.S.C. §§ 623(i), (l).

As originally passed in 1967, the ADEA did not apply to the States or their political subdivisions, or to the Federal Government. "In a Report issued in 1973, a Senate Committee found this gap in coverage to be serious, and commented that '[t]here is . . . evidence that, like the corporate world, government managers also create

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having participated in investigations or proceedings pursuant to the statute. Section 4(d), 29 U.S.C. § 623(d). Additional prohibitions, not relevant here, appear in §§ 4(a)(3), (b), (c) and (e), 29 U.S.C. §§ 623(a)(3), (b), (c) and (e).

an environment where young is somehow better than old.' " *EEOC v. Wyoming*, 460 U.S. at 233, quoting Senate Special Committee on Aging, *Improving the Age Discrimination Law*, 93d Cong., 1st Sess., 14 (Comm. Print 1973). The Act therefore was amended in 1974 by expanding the definition of "employer" in § 11(b), 29 U.S.C. § 630(b), to include "a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State," Pub. L. 93-259, § 28(a)(2), 88 Stat. 78, and by broadening the definition of "employee" so that public employees were no longer categorically excluded. *Id.* § 28(a)(4), 88 Stat. 74. However, persons elected to public office, the members of their personal staffs, and certain advisers, are excluded from the definition of "employee," as are policymaking appointees, unless they are "subject to the civil service laws of a State government, governmental agency, or political subdivision." Section 11(f), 29 U.S.C. § 630(f).<sup>3</sup> As amended, the Act also allows State and local governments to enforce maximum hiring ages and mandatory retirement ages for firefighters and law enforcement officers in many instances. See § 4(j), 29 U.S.C. § 623(j).

The 1974 amendments also brought federal employees under the coverage of the Act, through a separate provision which requires that "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . shall be made free from any discrimination based on age." Section 15(a), 29 U.S.C. § 633a(a).<sup>4</sup> Congress has extended the requirements and

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<sup>3</sup> The statute also permits, in both the public and private sectors, compulsory retirement of an employee over the age of 65 who holds "a bona fide executive or a high policymaking position," if the employee is entitled upon retirement to a specified level of retirement benefits. Section 12(c), 29 U.S.C. § 631(c).

<sup>4</sup> Certain types of federal positions, primarily in firefighting, law enforcement, and the foreign service, have been excluded from the



remedies of the ADEA to itself as well. *See* 2 U.S.C. § 1311(a)(2), (b)(2).

In the same 1974 statute that amended the ADEA to cover the States, Congress amended § 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b), which is incorporated by reference in the enforcement provisions of the ADEA, to provide that an action may be maintained by an aggrieved employee "against any employer (including a public agency) in any Federal or State court of competent jurisdiction." Pub. L. 93-259, § 6(d)(1), 88 Stat. 62. *See* ADEA § 7(b), 29 U.S.C. § 626(b) ("The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in section[ ] . . . 216 . . . of this title").

## 2. *Proceedings Below*

Petitioner Wellington Dickson was employed as a corrections officer by the Florida Department of Corrections at its Jackson Correctional Institution. His complaint alleges that upon being hired, he was told that his qualifications were such that he could expect to be promoted within six months to a year; yet, when suit was filed, he had been employed for more than five years without being promoted, while numerous younger employees who were less qualified than Dickson had been promoted. JA 86-92, 94-101, 106.<sup>5</sup> During that five-year period, Dickson was in his late 50s and early 60s. Dickson alleged that he had been denied promotion due to disparate treatment on the basis of his age. He also alleged that he had been subjected to retaliation for having complained to the

ban on maximum hiring ages and mandatory retirement. *See* 5 U.S.C. §§ 3307, 8335, and *infra* note 25.

<sup>5</sup> Citations to "JA" are to the Joint Appendix. Citations to "Pet. App." are to the Appendix to the Petition for a Writ of Certiorari in No. 98-791.

Florida Commission on Human Relations in 1994 of the age discrimination he was experiencing. JA 92, 94-96, 106.<sup>6</sup>

Petitioners Roderick MacPherson and Marvin Narz were the oldest faculty members in the College of Business at the University of Montevallo, a state university in Alabama. JA 22. They filed suit alleging that their employer "has followed a continuing practice of treating younger faculty members more favorably than older faculty members," through "the denial [to the latter] of promotions, committee assignments, sabbaticals, and . . . salaries." JA 22. The complaint further alleged that the College of Business "disparately treated its older faculty members" by using "an age-based evaluation system." JA 22-23. In the district court, "[t]he University concede[d] that genuine issues of material fact exist with regards to plaintiffs' claims of ADEA disparate treatment discrimination with regards to promotions, committee appointments and sabbatical leave." JA 113. In addition to their claims of disparate treatment, MacPherson and Narz asserted ADEA claims on disparate impact, JA 22-23, 113-119, and based on allegations that they had been subjected to retaliation for having filed a previous ADEA suit that had been settled. JA 23, 119-120.<sup>7</sup>

Petitioners J. Daniel Kimel, Jr., *et al.*, are thirty-six current and former faculty members and librarians ("faculty members") at Florida State University ("FSU") and Florida International University ("FIU"). FSU and FIU

<sup>6</sup> Dickson also asserted claims under the Americans With Disabilities Act. *See infra* note 12.

<sup>7</sup> MacPherson and Narz also asserted claims under the First Amendment, which were voluntarily dismissed, and claims alleging a hostile working environment, as to which the district court granted summary judgment to the defendant. Those claims are not at issue here.



are state universities. The *Kimel* plaintiffs filed suit alleging that the decision of the Florida Board of Regents not to require the payment of certain salary adjustments to senior faculty members was "an intentional act of age discrimination in violation of Section 623(a)(1) of the [ADEA]." JA 45.<sup>8</sup> Alternatively, the *Kimel* plaintiffs alleged that the Regents' policy of not requiring the payment of the adjustments had a disparate impact on older faculty members. JA 45.<sup>9</sup>

<sup>8</sup> The circumstances giving rise to the claims were as follows. In 1991, the Florida Board of Regents agreed to a collective bargaining agreement under which long-term faculty members would receive salary adjustments (identified in the agreement as "Market Equity/Compression Adjustments") in recognition of the fact that their salaries had not kept pace with the market value of their services, as reflected in the salaries of more recently hired faculty members. JA 42. The Florida legislature made the funds for the 1991-92 adjustments available, but then withdrew the funding before the adjustments were to take effect. JA 42. The withdrawal of funding was found by the Florida Supreme Court to violate the Florida Constitution's Contracts Clause. See *Chiles v. United Faculty of Fla.*, 615 So. 2d 671, 672-73 (Fla. 1993). The 1991-92 adjustments subsequently were distributed in a lump sum. JA 42. In 1992-93, however, salaries returned to the levels that had been in effect prior to the 1991-92 adjustments. JA 42-43. For 1993-94, the state legislature appropriated sufficient discretionary funds to cover permanent market equity/compression adjustments in the salaries of the senior employees of all the state universities. JA 43-44. The Regents, however, refused to require administrators at the universities to use the available funds in that manner. JA 43. Six of the nine universities nevertheless chose to allocate the funds to support permanent salary adjustments for senior employees, but FSU and FIU refused to allocate the funds for that purpose. JA 43-44. The Board of Regents sustained FSU's and FIU's action, and, notwithstanding the continued availability of funds, the Regents still refuse to include the market equity/compression adjustments in the *Kimel* plaintiffs' base salaries. JA 43-44.

<sup>9</sup> The *Kimel* plaintiffs also alleged violations of the Florida Human Rights Act, based on both "disparate treatment" and "disproportionate impact." JA 45. When the Court of Appeals ruled that the ADEA claims should be dismissed, it remanded the state-

In all three cases, the State defendants moved to dismiss the complaints on the ground that the Eleventh Amendment to the United States Constitution renders the States immune from suit in federal court under the ADEA.<sup>10</sup> The motions were denied in *Kimel* and *Dickson* and granted in *MacPherson*. See Pet. App. 51a-56a (*Kimel*); Pet. App. 57a-60a (*Dickson*); Pet. App. 61a-68a (*MacPherson*). Appeals were taken to the Eleventh Circuit in each case, and the appeals were consolidated for argument and decision.<sup>11</sup> The United States intervened in the Court of Appeals to defend the statute.

The Eleventh Circuit panel rendered three separate opinions, two of which concluded, on separate grounds,

law claims with instructions that they likewise be dismissed. Pet. App. 13a, n.17. The disposition of the state-law claims is not at issue in this Court.

Subsequent to the district court's order denying the defendant's motion to dismiss the case on Eleventh Amendment grounds, the *Kimel* plaintiffs abandoned their disparate treatment claim. See Joint Pre-Trial Stipulation (Docket #114). Nevertheless, in their brief in the Court of Appeals, the Board of Regents characterized the case as presenting both a "conten[tion] that FSU and FIU have intentionally discriminated against [the *Kimel*] plaintiffs because of their age" and a "further conten[tion] that denial of the market adjustment has disparately impacted the salaries of workers over the age of forty relative to younger employees." Initial Brief of Appellant in *State of Florida Board of Regents v. J. Daniel Kimel, et al.*, 11th Cir. No. 96-2788, at 5. No party took the position in the Court of Appeals that the disparate treatment claim was not part of the case insofar as the Eleventh Amendment issue was concerned.

<sup>10</sup> In *Kimel*, before moving to dismiss the complaint on Eleventh Amendment grounds, the State defendant first moved to dismiss on other grounds. That motion was denied. JA 31-36. In *MacPherson*, the State defendant first moved for summary judgment on the merits, which was denied in part and granted in part. JA 110-126.

<sup>11</sup> The orders in *Kimel* and *Dickson*, although interlocutory, were appealable under *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993).

that the ADEA claims were barred by the Eleventh Amendment.

Judge Edmonson concluded that "the ADEA's language [does not] include[ ] an *unequivocal* declaration of abrogation of States' immunity." Pet. App. 11a, n.14 (emphasis in original). He reached that conclusion on the grounds that the ADEA does not contain a "reference to the Eleventh Amendment or to States' sovereign immunity," or, "in one place, a plain, declaratory statement that States can be sued by individuals in federal court." Pet. App. 7a.

Judge Cox took the position that, "[w]hether or not Congress clearly expressed its intent, it lacks the power to abrogate the states' immunity . . . under the ADEA," Pet. App. 40a, because, in his opinion, the statute exceeds Congress' power to enforce the Fourteenth Amendment. Judge Cox declared that where age is involved, "the Supreme Court does not deem *all* arbitrary treatment offensive to the Fourteenth Amendment." Pet. App. 45a (emphasis in original). Rather, "[t]o violate the Equal Protection Clause . . . , the *arbitrary line itself* must have no rational basis." *Id.* (emphasis in original). According to Judge Cox, the ADEA is not permissible Fourteenth Amendment legislation because "the ADEA was enacted to combat *all* arbitrariness, unconstitutional or not." *Id.* (emphasis in original).

Chief Judge Hatchett dissented. He concluded that Congress' intent to abrogate the States' immunity from suits under the ADEA is stated with unmistakable clarity in the statute. Pet. App. 16a-18a. Chief Judge Hatchett also concluded

that the ADEA falls squarely within the enforcement power that Section 5 of the Fourteenth Amendment confers on Congress. . . . Congress enacted

the ADEA to remedy and prevent what it found to be a pervasive problem of arbitrary discrimination against older workers. Such protection is at the core of the Fourteenth Amendment's guarantee of equal protection under the law. Even though Congress arguably has gone further in proscribing government employment practices that discriminate on the basis of age than have the courts in adjudicating claims under the Fourteenth Amendment, this merely reflects the differing roles of Congress and the courts. [Pet. App. 21a-22a.]<sup>12</sup>

### SUMMARY OF ARGUMENT

1. Congress made its intention to abrogate State immunity from private-party suits in federal court for violations of the ADEA "unmistakably clear in the language of the statute." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). In 1974, Congress (i) amended the ADEA to include the States among the "employers" to whom the Act applies, and who can be sued by employees for violations, and (ii) amended § 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b), which is incorporated by reference in the ADEA, 29 U.S.C. § 626 (b), to provide that suits "may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees." As this Court recognized in *Alden v. Maine*, — U.S. —, No. 98-436 (1999), slip op. at 2, that

<sup>12</sup> The Eleventh Circuit further held in the *Dickson* appeal, over Judge Cox's dissent, that Congress permissibly abrogated the States' Eleventh Amendment immunity from suit in federal court under the Americans With Disabilities Act. See Pet. App. 12a-13a (opinion of Edmondson, J.); Pet. App. 29a-37a (opinion of Hatchett, J.); Pet. App. 48a-50a (opinion of Cox, J.). That ruling is not before the Court in this case. It is the subject of the petition for certiorari in *Florida Department of Corrections v. Dickson*, No. 98-829.



provision plainly “purport[s] to authorize private actions against States.”

2. Congress had the authority to authorize such actions by virtue of its power under § 5 of the Fourteenth Amendment.

That Amendment “quite clearly contemplates limitations on [the States’] authority,” placing on the States “duties with respect to their treatment of private individuals.” *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453 (1976). “Standing behind the imperatives is Congress’ power to ‘enforce’ them ‘by appropriate legislation.’” *Id.* (quoting Fourteenth Amendment, § 5).

In exercising its § 5 powers, Congress may “provide for private suits against States or state officials which are constitutionally impermissible in other contexts.” *Fitzpatrick*, 427 U.S. at 456. And “[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress’ enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into ‘legislative spheres of autonomy previously reserved to the States.’” *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) (quoting *Fitzpatrick*, 427 U.S. at 455). See also *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, — U.S. —, No. 98-531, slip op. at 9-10 (1999).

The Fourteenth Amendment’s Equal Protection Clause is directed first and foremost at arbitrary and invidious discrimination.

After an extensive process of factfinding and deliberation, through which Congress determined that older workers “were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes,” *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993), the

ADEA was enacted to combat such “invidious bias,” *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 357 (1995). And, upon finding that the same problems of arbitrary age discrimination that exist in the private sector are prevalent in government employment as well, Congress acted to apply the ADEA to the public sector.

Congress crafted in the Act a carefully measured set of prohibitions and exceptions, to achieve the objective of preventing and remedying invidious age discrimination. Because such discrimination violates the Equal Protection Clause, there is every “reason to believe that many of the [employment actions] affected by the congressional enactment have a significant likelihood of being unconstitutional.” *City of Boerne*, 521 U.S. at 532. And, to the extent that the ADEA reaches some conduct that the courts would not find violative of the Equal Protection Clause, this largely reflects limitations on the nature and scope of *judicial* scrutiny rather than inherent substantive limitations on the Equal Protection Clause or on Congress’ enforcement authority under § 5.

The ADEA statutory scheme thus is designed to “deter[] or remed[y] constitutional violations,” *City of Boerne*, 521 U.S. at 518, and “[t]here [is] a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end,” *id.* at 520. Congress’ decision to enact the ADEA and to apply it to the States is well within Congress’ power under § 5 “to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations.” *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 490 (1989) (opinion of O’Connor, J.) (emphasis in original).



## ARGUMENT

### I. THE ADEA CONTAINS A CLEAR STATEMENT OF CONGRESS' INTENT TO SUBJECT STATES TO SUITS BY PRIVATE PARTIES IN FEDERAL COURT

This Age Discrimination in Employment Act lawsuit—like any private party federal statutory cause of action lawsuit against a State in federal court—raises two threshold Eleventh Amendment state sovereign immunity questions. First, did Congress, in enacting the ADEA, have the constitutional authority to subject the States to such suits in federal court and in that respect to abrogate the States' Eleventh Amendment immunity? And, second, if so, did Congress in the ADEA make its intention to abrogate State immunity unmistakably clear? As to both questions the answer here is an unequivocal "yes."<sup>13</sup>

<sup>13</sup> In *EEOC v. Wyoming*, 460 U.S. 226 (1983), this Court noted, but did not decide, the question "whether [the ADEA] could . . . be upheld as an exercise of Congress' powers under § 5 of the Fourteenth Amendment." 460 U.S. at 243. See also *id.* at 251, 259-263 (Burger, C.J., dissenting); *Gregory v. Ashcroft*, 501 U.S. 452, 468 (1991). In the ensuing years eight circuits have answered that question in the affirmative and have held that the ADEA clearly and permissibly abrogates State immunity from suit in federal court. *Wichmann v. Board of Trustees of Southern Ill. Univ.*, — F.3d —, No. 97-2902, 1999 WL 366742 (7th Cir. June 7, 1999); *Goshtasby v. Board of Trustees of the Univ. of Ill.*, 141 F.3d 761 (7th Cir. 1998); *Davidson v. Board of Governors of State Colleges & Univ.*, 920 F.2d 441 (7th Cir. 1990); *Cooper v. New York State Office of Mental Health*, 162 F.3d 770 (2d Cir. 1998); *Migneault v. Peck*, 158 F.3d 1131 (10th Cir. 1998); *Hurd v. Pittsburgh State University*, 109 F.3d 1540 (10th Cir. 1997); *Coger v. Board of Regents of State of Tenn.*, 154 F.3d 296 (6th Cir. 1998); *Keeton v. University of Nev. Sys.*, 150 F.3d 1055 (9th Cir. 1998); *Scott v. University of Miss.*, 148 F.3d 493 (5th Cir. 1998); *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694 (1st Cir. 1983); *Arritt v. Grisell*, 567 F.2d 1267 (4th Cir. 1977). See also *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 695 (3d Cir. 1996) (stating the same view in dictum). The Eleventh Circuit's

In the first regard, this case is governed by *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). In stating the *Fitzpatrick* Court's holding, Justice Rehnquist (as he then was) put the salient point there and here simply and succinctly:

[W]e think that the Eleventh Amendment, and the principle of state sovereignty which it embodies . . . , are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce "by appropriate legislation" the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts. [427 U.S. at 456 (footnote omitted).]

All of the Court's recent Eleventh Amendment/state sovereign immunity cases reaffirm *Fitzpatrick's* holding on Congress' Fourteenth Amendment § 5 authority to subject the States to private party federal statutory causes of action in federal court. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 59 (1996) ("§ 5 of the Fourteenth Amendment allow[s] Congress to abrogate the immunity from suit guaranteed by [the Eleventh] Amendment");

contrary position also has been adopted by the Eighth Circuit. See *Humenansky v. Regents of Univ. of Minn.*, 152 F.3d 822 (8th Cir. 1998).

*Alden v. Maine*, — U.S. —, No. 98-436, slip. op. at 47 (1999) (“in adopting the Fourteenth Amendment, the people required the States to surrender a portion of the sovereignty that had been preserved to them by the original Constitution, so that Congress may authorize private suits against nonconsenting States pursuant to its § 5 enforcement power”); *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, — U.S. —, No. 98-531, slip op. at 8 (1999) (“*Florida Prepaid*”) (“this Court in *Seminole Tribe* . . . reaffirmed its holding in *Fitzpatrick* . . . that Congress retains the authority to abrogate state sovereign immunity pursuant to the Fourteenth Amendment”); *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, — U.S. —, No. 98-149, slip op. at 2 (1999) (“Congress may authorize . . . a suit [by an individual against a State] in the exercise of its power to enforce the Fourteenth Amendment—an Amendment enacted after the Eleventh Amendment and specifically designed to alter the federal-state balance”).

In the second regard, as we now show, the ADEA’s statutory language meets the requirement of *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) that “Congress may abrogate the States’ constitutionally secure immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.”

“[T]here is no doubt [that] the intent of [the 93d] Congress was . . . to extend the application of the ADEA to the States.” *EEOC v. Wyoming*, 460 U.S. at 244 n.18. See *supra* at 4-6. And, the enforcement provisions incorporated into the ADEA state in terms that Congress is authorizing employees aggrieved by a State’s violation of the Act to bring suit for redress against the State in federal court.

“[The] remedial provisions [of the ADEA] incorporate by reference the provisions of the Fair Labor Standards Act [FLSA].” *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 357 (1995). See generally *Lorillard v. Pons*, 434 U.S. 575, 578-79 (1978). “[B]ut for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA.” *Id.* at 582.<sup>14</sup> The vehicle for that incorporation is § 7(b) of the ADEA, 29 U.S.C. § 626(b), which provides that “[t]he provisions of [the ADEA] shall be enforced in accordance with the powers, remedies, and procedures provided in [specified sections of the FLSA].”

Section 16(b) of the FLSA, 29 U.S.C. § 216(b)—which is “one of the provisions the ADEA incorporates,” *Hoffmann-LaRoche Inc. v. Sperling*, 493 U.S. 165, 167 (1989)—in its turn provides that suits for violations “may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees.” And, “public agency” as used therein is defined to include “a State, or a political subdivision of a State.” 29 U.S.C. § 203(x). As the Court recognized in *Alden v. Maine*, the point of this statutory language is to “purport to authorize private actions against States . . . without regard for consent.” Slip op. at 2.

<sup>14</sup> Thus, many essential components of the ADEA enforcement scheme are found only in the language incorporated by reference from the FLSA. This is true, for example, of the procedures applicable to class actions, see *Hoffman-LaRoche Inc. v. Sperling*, 493 U.S. 165 (1989), the authorization of attorneys’ fees (not mentioned in the text of the ADEA but incorporated by reference into 29 U.S.C. § 216(b)), and the calculation of liquidated damages (the availability of which is limited by ADEA § 7(b) to cases of willful violations, but the amount of which is determined by reference to 29 U.S.C. § 216(b)).



Indeed, the evolution of § 16(b) demonstrates that its precise office is to authorize private party suits against the States and to do so in a manner that unmistakably abrogates State immunity from suit. Prior to 1974, § 16(b) did not contain specific references to “public agenc[ies]” and to “Federal or State” courts. See *Employees v. Missouri Public Health Dept.*, 411 U.S. 279, 283 (1973) (“*Missouri Employees*”) (quoting the original language). In 1973, this Court held in *Missouri Employees* that the original language of § 16(b) did not clearly abrogate the States’ Eleventh Amendment immunity. In amending the provision the next year to refer specifically to “public agenc[ies]” and to “Federal or State” courts, see Pub. L. 93-259, § 6(d)(1), 88 Stat. 62, Congress also enacted 29 U.S.C. § 255(d), which retroactively suspended the running of the statute of limitations “with respect to any cause of action brought under section 16(b) . . . against a State or a political subdivision of a State in a district court of the United States on or before April 18, 1973”—the date *Missouri Employees* was decided. See Pub. L. 93-259, § 6(d)(2)(A), 88 Stat. 62. That statutory language leaves no doubt that the 1974 amendment to § 16(b) was intended to supply the clear statement of Congress’ intention to abrogate State immunity that the *Missouri Employees* Court had found to be lacking in the pre-1974 provision. And, the Committee Reports accompanying the 1974 amendment make that point in terms:

This amendment is necessitated by the decision of the U.S. Supreme Court in *Missouri, et al.* (April, 1973) which held that Congress in extending coverage under the 1966 amendments to school and hospital employees in state and local governments did not explicitly provide the individual a right of action in the Federal courts although the Secretary of Labor

was authorized to bring such suits. In addition the committee included an amendment to the Portal-to-Portal Act of 1947 [29 U.S.C. § 255(d), *supra*] which would preserve existing actions brought by private individuals which would otherwise be barred by the statute of limitations as a result of the April decision. [H. Rep. No. 93-913, 93d Cong., 2d Sess., 41 (1974).]

See also *id.* at 45; S. Rep. No. 93-690, 93d Cong., 2d Sess., 56 (1974).

By incorporating § 16(b) in the ADEA, then, Congress unmistakably subjected the States to private party suits in federal court for violations of the Act. To be sure, Judge Edmondson took a contrary position in the court below, considering it decisive that “[n]o reference to the Eleventh Amendment or to States’ sovereign immunity is included [in the ADEA]. Nor is there, in one place, a plain, declaratory statement that States can be sued by individuals in federal court.” Pet. App. 7a. That is to misunderstand the *Atascadero* clear statement rule. As Justice Scalia indicated in his separate opinion in *Dellmuth v. Muth*, 491 U.S. 223, 233 (1989), an “explicit reference to state sovereign immunity or the Eleventh Amendment” is *not* required. And, this Court in *Seminole Tribe* found an unmistakably clear statement of Congress’ intent to abrogate State immunity in a statute that had no express reference to sovereign immunity or the Eleventh Amendment—a statute, moreover, so constituted that it was necessary to read its “various provisions” together, and to consider their “context,” 517 U.S. at 56-57, in order to discern Congress’ clear intent to make the States subject to suit and to abrogate their Eleventh Amendment immunity.

We recognize too that in *Humenansky v. Regents of University of Minnesota*, *supra* note 13, the Eighth Cir-



cuit held that Congress' incorporation into the ADEA of § 16(b) is not a sufficient indication of its intent to abrogate the States' immunity from ADEA suits because that action was not accompanied by an amendment to § 7(c) of the ADEA, 29 U.S.C. § 626(c), which states, among other things, that "[a]ny person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter." *See Humenansky*, 152 F.3d at 824-25.

But the amendment that Congress *did* make to FLSA § 16(b) was sufficient to accomplish its ends, and Congress had no need to amend ADEA § 7(c) as well. It cannot be gainsaid, *first*, that § 16(b) is in its own terms an unmistakably clear statement of Congress' intent to subject the States to private party suits and to abrogate their immunity, *see supra* at 17; *second*, that § 16(b) is, through its incorporation by § 7(b), part of the ADEA, *see supra* at 17; and *third*, that § 7(c) of the ADEA—which simply is less *specific* than § 16(b)—in no way *conflicts* with the latter provision. The ADEA thus contains (through the § 7(b) incorporation by reference) a provision that expressly authorizes private party suits against the States without their consent, *see Alden, supra*, and neither § 7(c) nor any other provision of that ADEA countermands that authorization. By incorporating § 16(b) into the ADEA, Congress clearly and unmistakably abrogated the States' Eleventh Amendment immunity from suits by employees to redress violations of the Act.

All this being true, the sole remaining question to be decided here is whether § 5 of the Fourteenth Amendment grants Congress the authority to enact age discrimination legislation such as the ADEA. We turn to that question now and show that again the answer is "yes."

## II. THE APPLICATION OF THE ADEA TO THE STATES IS WITHIN CONGRESS' POWER UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT

### A. Congress Has Broad Authority to Enact Legislation Enforcing the Equal Protection Guaranty of the Fourteenth Amendment

In holding that Congress has the power under § 5 of the Fourteenth Amendment to abrogate the States' Eleventh Amendment immunity from suit, *see supra* at 15, the *Fitzpatrick* Court began by observing that the Fourteenth Amendment "quite clearly contemplates limitations on [the States'] authority . . . . The substantive provisions are by express terms directed at the States. Impressed upon them by those provisions are duties with respect to their treatment of private individuals." 427 U.S. 453. And, after so recognizing the Amendment's role as a limit on state authority, the *Fitzpatrick* Court went on immediately to recognize Congress' paramount role in translating the Amendment's commands into positive statutory law: "Standing behind the imperatives is Congress' power to 'enforce' them 'by appropriate legislation.'" *Id.*

Citing *Ex parte Virginia*, 100 U.S. 339 (1880), and subsequent decisions, as having explicated "the reach of congressional power under § 5," 427 U.S. at 453, the *Fitzpatrick* Court added:

There can be no doubt that this line of cases has sanctioned intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States. The legislation considered in each case was grounded on the expansion of Congress' powers—with the corresponding diminution of state sovereignty—found to be intended by the Framers and made part of the Constitution upon the

States' ratification of those Amendments. [*Id.* at 455-56.]

In each of the foregoing regards, *Fitzpatrick* has the firmest grounding in the constitutional text. The substantive provisions of the Fourteenth Amendment, set out in § 1 thereof, are self-executing. See *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997). If the Framers of the Amendment had intended that the Amendment would be effectuated solely through judicial determinations as to whether this, or that, particular state government action violated the Amendment's commands, the Framers could have rested with § 1. But the Framers went on to establish Congress' enforcement power in § 5. "By adding this authorization, the Framers indicated that Congress was to be chiefly responsible for implementing the rights created in § 1." *South Carolina v. Katzenbach*, 383 U.S. 301, 325-26 (1966). See also *Katzenbach v. Morgan*, 384 U.S. 641, 649 (1966) (the Fourteenth Amendment was designed to "augment[ ] the power of Congress, rather than the judiciary"); *City of Boerne*, 421 U.S. at 536 ("[i]t is for Congress in the first instance to 'determine[ ] whether and what legislation is needed to secure the guarantees for the Fourteenth Amendment,' and its conclusions are entitled to much deference") (quoting *Katzenbach v. Morgan*, 384 U.S. at 651); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (opinion of O'Connor, J.) (§ 5 grants Congress "a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment").

The Court's understanding of the place of the Fourteenth Amendment in the federal-state balance and of the central role of Congress in enforcing the Amendment's guarantees has been uniform from *Ex parte Virginia* to *Fitzpatrick* and beyond. Thus, two Terms ago the Court described Congress' § 5 power as follows:

All must acknowledge that § 5 is "a positive grant of legislative power" to Congress, *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966). In *Ex parte Virginia*, 100 U.S. 339, 345-346 (1880), we explained the scope of Congress' § 5 power in the following broad terms:

"Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power." [*City of Boerne*, 521 U.S. at 517-18.]<sup>15</sup>

<sup>15</sup> Elaborating on the analysis in *Ex parte Virginia*, numerous decisions of this Court have described Congress' power under § 5 as having the same breadth as its power to legislate under the Necessary and Proper Clause:

The basic test to be applied in a case involving [the enforcement clauses of the Civil War Amendments] is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States. Chief Justice Marshall laid down the classic formulation, 50 years before the [Amendments were] ratified:

"Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch v. Maryland*, 4 Wheat. 316, 421 [17 U.S. 316 (1819)]. [*South Carolina v. Katzenbach*, 383 U.S. at 326.]

*Accord*, *Fullilove v. Klutznick*, 448 U.S. 448, 476 (1980) (opinion of Burger, C.J.); *City of Rome v. United States*, 446 U.S. 156, 176-77 (1980); *Katzenbach v. Morgan*, 384 U.S. at 650-51.

Thus, in authorizing Congress to enact "appropriate" legislation to enforce the provisions of the Fourteenth Amendment, see *Florida*



And, the Court went on to say:

Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into "legislative spheres of autonomy previously reserved to the States." [*Id.* at 518 (quoting *Fitzpatrick*, 427 U.S. at 455).]

As the foregoing makes evident, "[i]t has never been seriously maintained that Congress can do no more than the judiciary to enforce the [Fourteenth] Amendment's commands." *City of Rome v. United States*, 446 U.S. 156, 210 (1980) (Rehnquist, J., dissenting). To the contrary, "[t]he power to 'enforce' may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations." *J.A. Croson*, 488 U.S. at 490 (opinion of O'Connor, J.) (emphasis in original).

Not surprisingly then, both *City of Boerne* and *Florida Prepaid* expressly reaffirm Congress' authority under § 5 to enact legislation that "prohibits conduct which is not itself unconstitutional," *City of Boerne*, 521 U.S. at 518; *Florida Prepaid*, slip op. at 9-10, as long as the legislation is not so far removed from enforcing rights created by the Fourteenth Amendment that the enactment can only be seen as an attempt "to decree the *substance* of the Fourteenth Amendment's restrictions on the States." *City of Boerne*, 521 U.S. at 545 (O'Connor, J., dissenting)

*Prepaid*, slip op. at 9, the Framers of the Amendment did not leave the courts free to second-guess Congress' judgment as to what legislation is "appropriate," any more than the Necessary and Proper Clause leaves the courts free to second-guess the "necess[ity]" or "prop[riety]" of legislation.

(emphasis in original), quoting *id.* at 519 (opinion of the Court).

At the same time, both *City of Boerne* and *Florida Prepaid* remind us that, "[a]s broad as the congressional enforcement power is, it is not unlimited," . . . and . . . 'Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation.' " *Florida Prepaid*, slip op. at 10, quoting *City of Boerne*, 521 U.S. at 518-19. In considering whether legislation crosses "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law," *City of Boerne*, 521 U.S. at 519, the Court has looked to whether there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end," *id.* at 520. Such "congruence and proportionality" are demanded not for their own sake, but as a gauge in determining whether the legislation in question operates to protect rights recognized under the Fourteenth Amendment, or to create rights apart from those established by the Amendment. *Id.* at 519-20.

*City of Boerne* and *Florida Prepaid* begin—and only begin—the process of giving content to this distinction and to the "congruence and proportionality" test. We characterize the two decisions in those terms because the statutes in question in those cases were on their face designed to work a qualitative substantive *change* in Fourteenth Amendment rights, not to *enforce* any such right.

In *City of Boerne*, Congress had announced that it was enacting the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq.*, because Congress was of the view that "governments should not substantially burden



religious exercise without compelling justification.” 521 U.S. at 515, quoting 42 U.S.C. § 2000bb(a)(3). The substantive provisions of the statute were designed to enforce that congressional-created norm, rather than to prevent any unconstitutional action. See 521 U.S. at 515-16, 532-35. RFRA, in other words, was an attempt by Congress to overrule this Court’s decision in *Employment Div., Dep’t. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), which had held that the Constitution does not give religious practitioners a right to be free of burdens resulting from laws of general application.

In *Florida Prepaid*, the Patent and Plant Variety Protection Remedy Clarification Act (Patent Remedy Act), 35 U.S.C. § 271(h), 296(a), in the guise of legislation to enforce the Due Process Clause sought to authorize suits against States in federal court for patent infringement. Despite settled law that a due process violation exists only where a State has committed an intentional deprivation of property and has failed to provide adequate remedies, the Patent Remedy Act was not focused on intentional infringement, and the adequacy or inadequacy of state remedies played no role whatsoever in the operation of the Act. See *Florida Prepaid*, slip op. at 16-17.<sup>16</sup>

“Simply put, RFRA [and the Patent Remedy Act were] not designed to identify and counteract state laws likely to be unconstitutional.” *City of Boerne*, 521 U.S. at 534-35. As we now proceed to demonstrate, the ADEA is at the opposite end of the Fourteenth Amendment spectrum. As legislation adopted to prevent and remedy arbitrary and

<sup>16</sup> In both *City of Boerne* and *Florida Prepaid*, the Court found as well that the legislative histories of the statutes at issue there confirmed that they had been designed to accomplish ends having nothing to do with the enforcement of rights created by the Fourteenth Amendment. See *City of Boerne*, 521 U.S. at 529-32; *Florida Prepaid*, slip op. at 11-20.

invidious discrimination, the ADEA “can[] be understood as responsive to, or designed to prevent, unconstitutional behavior,” *id.* at 532, and as such the Act is within Congress’ § 5 authority.

#### B. The ADEA Is Within Congress’ § 5 Enforcement Authority

1. Antidiscrimination legislation such as the ADEA is squarely within Congress’ authority under Fourteenth Amendment § 5 to enforce the Equal Protection Clause.

That Clause is “essentially a direction that all persons similarly situated should be treated alike.” *Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432, 439 (1985). Accordingly, a State violates the Clause if it “rel[ies] on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.” *Id.* at 446. See also *Romer v. Evans*, 517 U.S. 620, 635 (1996) (characterizing this as the “conventional and venerable” principle of the Equal Protection Clause); *Lindsey v. Normet*, 405 U.S. 56, 79 (1972) (“discrimination against [the poor that is] arbitrary and irrational . . . violates the Equal Protection Clause”); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 83 (1988) (“As *Lindsey* demonstrates, arbitrary and irrational discrimination violates the Equal Protection Clause under even our most deferential standard of review.”); *Williams v. Vermont*, 472 U.S. 14, 22 (1985) (“to provide a [tax] credit only to those who were residents . . . is an arbitrary distinction that violates the Equal Protection Clause”).

A State’s ordering of its relations with those who are or would be in its service is subject to this basic command of the Equal Protection Clause: the Clause gives individuals “a federal constitutional right to be considered for public service without the burden of invidiously discriminatory

disqualifications.” *Turner v. Fouche*, 396 U.S. 346, 362 (1970). *Accord*, *Quinn v. Millsap*, 491 U.S. 95 (1989). An employment qualification need not be based on race or some other inherently suspect criterion to be considered “invidiously discriminatory” in this sense. This Court has characterized the ADEA itself as directed at “invidious bias.” *McKennon*, 513 U.S. at 357. And, in *Quinn*, this Court unanimously held that “it is a form of invidious discrimination to require land ownership of all appointees to a body authorized to propose reorganization of local government.” *Id.* at 107. The Court reached that result by “apply[ing] no more than . . . rationality review,” *id.*, and despite the local government’s contention that the land ownership qualification was rational because it tended to ensure that appointees would have “first-hand knowledge of,” and a “tangible stake” in, the governmental activities with which the body would deal. *Id.*<sup>17</sup>

2. After a “process of factfinding and deliberation formally begun in 1964,” *EEOC v. Wyoming*, 460 U.S. at 231, Congress enacted the ADEA “to prohibit arbitrary age discrimination,” *id.* at 229. The ADEA, aimed as it is at eliminating “invidious bias in employment decisions,” *McKennon*, 513 U.S. at 357, thus serves—in common with the other federal employment discrimination statutes—to enforce the core command of the Equal Protection Clause. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (“Congress’ promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and

<sup>17</sup> *See also Turner*, 396 U.S. at 364 (although it may be “reasonable [to] assum[e]” that ownership of property contributes to an individual’s “attachment to the community and its educational values,” the State “may not rationally presume that that quality is necessarily wanting in all citizens of the county [who do not possess such property]”).

stigmatizing stereotypes.”) *Cf. Commissioner v. Schleier*, 515 U.S. 323, 339 (1995) (O’Connor, J., dissenting) (observing that discrimination based on age works the same “offense to the rights and dignity of the individual . . . [as] discrimination that is based on race [or] sex”).<sup>18</sup>

<sup>18</sup> Congress did not make any explicit reference to the Fourteenth Amendment when it extended the ADEA to the States. But “the . . . constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.” *Wyoming*, 460 U.S. at 243-44 n.18, quoting *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948).

It is true that, where a party urges an application of a statute that would be permissible only if Congress had exercised its § 5 authority, and the statute is ambiguous as to whether it was intended to be applied as the party is urging, the Court does require a clear indication that Congress was invoking its § 5 power. *See Gregory*, 501 U.S. at 470-73; *Pennhurst State Sch. v. Halderman*, 451 U.S. 1, 15-17 (1981). Such “a rule of statutory construction to be applied where statutory intent is ambiguous,” *Gregory*, 501 U.S. at 470, has nothing to do with a rule that would require Congress to specify the constitutional provision under which it was legislating when there is no ambiguity as to how the substantive terms of the legislation are to be applied. *See Wyoming*, 460 U.S. at 244 n.18 (distinguishing *Pennhurst*); *Hilton v. South Carolina Pub. Railways Comm’n*, 502 U.S. 197, 206 (1991) (“the plain statement rule [i]s ‘a rule of statutory construction to be applied where statutory intent is ambiguous’ . . . , rather than . . . a rule of constitutional law”).

Very simply stated, Congress is not required to make a recital of the source of its power in the text of the statute, whose office is to state what Congress is commanding, not to justify Congress’ action by identifying the source(s) of constitutional power. And, it would be unprecedented even to suggest that Congress must set out in legislative history the powers under which it has acted. “It is in the nature of [this Court’s] review of congressional legislation defended on the basis of Congress’ powers under § 5 of the Fourteenth Amendment that we be able to discern some legislative purpose or factual predicate that supports the exercise of that power. That does not mean, however, that Congress need anywhere recite the words ‘section 5’ or ‘Fourteenth Amendment’ or ‘equal protection.’” *Wyoming*, 460 U.S. at 243 n.18. *See Fullilove v. Klutznick*, 448 U.S. 448, 476-78 (1980) (opinion of Burger, C.J.);



As the Court noted in *EEOC v. Wyoming*, the enactment of the ADEA was prompted by a report of the Secretary of Labor, "whose findings were confirmed throughout the extensive factfinding undertaken by the Executive Branch and Congress," which "came to the . . . basic conclusions . . . [that] age discrimination . . . was based in large part on stereotypes unsupported by objective fact, and was often defended on grounds different from its actual causes . . . [; that] the available empirical evidence demonstrated that arbitrary age lines were in fact generally unfounded and that, as an overall matter, the performance of older workers was at least as good as that of younger workers . . . [; and that] arbitrary age discrimination was profoundly harmful . . . [to] the national economy . . . [and to] individual workers." 460 U.S. at 230-31. See also 113 Cong. Rec. 34746 (1967) (Rep. Daniels) (the ADEA's "legal prohibition against age discrimination in employment" is necessary "to overcome prejudice"); *Age Discrimination in Employment: Hearings Before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, 90th Cong., 1st Sess., 28 (1967) (Sen. Javits) (the ADEA was designed to "break down . . . wholly irrational barriers to employment based on age alone")*.

Not only the legislative history, but the statement of purpose codified in the Act, emphasizes that Congress' aim was to prevent and to remedy *arbitrary discrimination* based on age. See ADEA § 2(a)(2), 29 U.S.C. § 621(a)(2) ("the setting of arbitrary age limits regardless of potential for job performance has become a common practice"); § 2(a)(4), 29 U.S.C. § 621(a)(4) (referring to "arbitrary discrimination in employment because of

*Griffin v. Breckenridge*, 403 U.S. 88, 107 (1971); *United States v. Butler*, 297 U.S. 1, 61 (1936); *Woods v. Cloyd W. Miller Co.*

age"); § 2(b), 29 U.S.C. § 621(b) ("It is therefore the purpose of this chapter . . . to prohibit arbitrary age discrimination in employment").<sup>19</sup>

Although the ADEA as enacted in 1967 was confined to private employment, Congress soon came to understand that the same problems of arbitrary discrimination were prevalent in government employment as well. "In a Report issued in 1973, a Senate Committee found [the Act's] gap in coverage to be serious, and commented that '[t]here is . . . evidence that, like the corporate world, government managers also create an environment where young is somehow better than old.'" *Wyoming*, 460 U.S. at 233, quoting Senate Special Committee on Aging, *Improving the Age Discrimination Law*, 93d Cong., 1st Sess., 14 (Comm. Print 1973).

A year before that report was issued, Senator Bentsen had introduced a bill to extend the ADEA to public em-

<sup>19</sup> The Secretary of Labor's report distinguished between "action to eliminate arbitrary age discrimination in employment," on the one hand, and other kinds of action "to adjust institutional arrangements which work to the disadvantage of older workers," "to increase the availability of work for older workers," and "to enlarge educational concepts and institutions to meet the needs and opportunities of older age." Report of the Secretary of Labor, *The Older American Worker: Age Discrimination in Employment* (1965) at 21-25, reproduced in EEOC, *Legislative History of the Age Discrimination in Employment Act* (1981) at 16 *et seq.* It was under the first of those categories—"action to eliminate arbitrary age discrimination"—that the Secretary proposed the adoption of enforcement legislation. Report of the Secretary of Labor at 21-22. Consistent with the Secretary's recommendations, the preamble to the ADEA mentions other purposes besides the elimination of discrimination. See ADEA § 2(a)(1), (3), (b), 29 U.S.C. § 621(a)(1), (3), (b). Those additional purposes gave rise to the provisions of the Act establishing education and research programs, see ADEA § 3, 29 U.S.C. § 622, not to the enforcement provisions of the statute that are the subject of this case. See Report of the Secretary of Labor at 22-25 (recommending actions along the lines ultimately embodied in § 3).



ployment, declaring that "there are strong indications that the hiring and firing practices of governmental units discriminate against the elderly," often in "flagrant" fashion. 118 Cong. Rec. 7745 (1972) (citing newspaper reports, case studies, letters and other sources of information). In extending the ADEA to public employment in 1974, Congress made clear that it was doing so in order to prevent and remedy the same kinds of arbitrary and irrational discrimination as had been the focus of the 1967 legislation. Senator Bentsen stated that "[t]he passage of this measure insures that Government employees will be subject to the same protections against arbitrary employment [discrimination] based on age as are employees in the private sector." 120 Cong. Rec. 8768 (1974). The House Committee Report similarly explained:

As the President said in his message of March 23, 1972, supporting such an extension of coverage under the ADEA, "Discrimination based on age—what some people call 'age-ism'—can be as great an evil in our society as discrimination based on race or religion or any other characteristic which ignores a person's unique status as an individual and treats him or her as a member of some arbitrarily-defined group. . . ." [H. Rep. No. 93-913, *supra*, at 40; S. Rep. No. 93-690, *supra*, at 55.]

The Report went on to discuss the need to "dispel[] 'pre-conceived notions or myths' about the older worker," and concluded:

The committee expects that expanded coverage under the Age Discrimination in Employment law will remove discriminatory barriers against employment of older workers in government jobs at the Federal and local government levels as it has and continues to do in private employment. [H. Rep. No. 93-913, at 40-41; S. Rep. No. 93-690, at 55-56.]

Accordingly, the substantive provisions of the ADEA are designed to "prohibit[] arbitrary discrimination in the workplace based on age." *Lorillard v. Pons*, 434 U.S. at 577. Under the ADEA, a showing that an employer took an action that harmed an older worker "because of [his] age" is necessary to establish a case.<sup>20</sup> But such a show-

<sup>20</sup> Section 4(a)(1) of the Act, 29 U.S.C. § 623(a)(1), makes it unlawful for an employer "to . . . discriminate . . . because of [an] individual's age." Section 4(a)(2), 29 U.S.C. § 623(a)(2), makes it unlawful as well for an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." Those provisions "were derived *in haec verba* from Title VII." *Lorillard v. Pons*, 434 U.S. at 584. See 42 U.S.C. § 2000e-2(a). Under Title VII, the language has been interpreted by this Court to allow claims based on disparate impact as well as claims based on disparate treatment. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Congress subsequently amended Title VII to provide more explicitly for causes of action based on disparate impact, and to clarify the proof requirements for such claims. See Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074-75 (1991). The ADEA, however, was not amended in this respect.

Because the ADEA contains the language that, in *Griggs*, was held to contemplate disparate impact claims, we submit that such claims are cognizable under the ADEA. However, this Court "ha[s] never decided whether a disparate impact theory of liability is available under the ADEA." *Hazen Paper Co.*, 507 U.S. at 610. See also *id.* at 618 (Kennedy, J., concurring); *Markham v. Geller*, 451 U.S. 945 (1981) (Rehnquist, J., dissenting from denial of certiorari). Subsequent to *Hazen Paper Co.*, three circuits have held that disparate impact claims are cognizable under the ADEA. See *Arnett v. California Public Employees Retirement Sys.*, — F.3d —, No. 98-15574, 1999 WL 346629 (9th Cir. June 2, 1999); *District Council 37 v. New York City Dept. of Parks & Recreation*, 113 F.3d 347, 351 (2d Cir. 1997); *Houghton v. SIPCO*, 38 F.3d 953, 958-59 (8th Cir. 1994). Four circuits have held or suggested the contrary. See *Mullin v. Raytheon Co.*, 164 F.3d 696 (1st Cir. 1999); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1007 (10th Cir.), *cert. denied*, 517 U.S. 1245 (1996); *Lyon v. Ohio Educ. Ass'n*, 53 F.3d 135, 138-39 (6th Cir. 1995); *EEOC v. Francis W. Parker School*, 41 F.3d 1073, 1076-78 (7th Cir. 1994), *cert. denied*, 515

ing is not *sufficient* to establish that the employer has violated the Act: the employer's action still may be found to be permissible under the Act by reason of any of several exceptions fashioned by Congress to protect practices that can be shown to be based on reasonable distinctions rather than on irrational stereotypes.

First, and perhaps foremost, "in order to insure that employers [a]re permitted to use neutral criteria not directly dependent on age, and in recognition of the fact that even criteria that are based on age are occasionally justified, the Act provide[s] that certain otherwise prohibited employment practices [are] not . . . unlawful 'where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age.'" *Wyoming*, 460 U.S. at 232-33, quoting § 4(f)(1), 29 U.S.C. § 623(f)(1). Among other things, that provision leaves an employer, including a State, free to "assess the fitness of its [employees] and dismiss those . . . whom it reasonably finds

U.S. 1142 (1995). The Eleventh Circuit has described the issue as an open one. *Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1437 n.17 (11th Cir.), *cert. denied*, 119 S. Ct. 405 (1998).

Whether the ADEA allows claims based on disparate impact—and if so, in what circumstances and subject to what standards of proof—is not presented for decision in this case. The Eleventh Circuit dismissed all of the claims in the three consolidated actions, including claims of disparate treatment. To decide this case, it is sufficient to determine whether ADEA disparate *treatment* claims may be pursued against a State in federal court. If the answer is yes, the decision below must be reversed; the question whether disparate *impact* claims may be asserted against a State defendant then could be considered by the Court of Appeals on remand. However, if this Court finds it appropriate to address that question, our submission will establish that Congress has the power under § 5 to authorize disparate impact claims on the terms contained in the ADEA. *See infra* at 43-44 and note 26.

to be unfit." *Wyoming*, 460 U.S. at 239. The State's "goals" as an employer, and "the public policy decisions underlying them," *id.*, thus are preserved; the Act simply "requires the State to achieve its goals in a more individualized and careful manner than would otherwise be the case." *Id.* *See also Johnson v. Mayor and City Council of Baltimore*, 472 U.S. 361, 360-61 (1985).

Congress also recognized that the costs of many benefit plans would increase significantly if such plans had to be provided to older workers on the same terms as to younger workers. To ensure that the Act would not operate to prohibit reasonable age distinctions in such plans, "Congress, in passing the ADEA, included a provision specifically disclaiming a construction of the Act which would require that the health and similar benefits received by older workers be in all respects identical to those received by younger workers." *Wyoming*, 460 U.S. at 241-42, citing § 4(f)(2), 29 U.S.C. § 623(f)(2). The Act addresses the subjects of pension benefits, retiree health benefits, and severance pay in great detail, in an effort to define the circumstances in which age-based distinctions regarding such benefits reflect legitimate cost concerns rather than arbitrary discrimination. *See* §§ 4(f)(2)(B), (i), (1), 29 U.S.C. §§ 623(f)(2)(B), (i), (1).

Congress displayed in addition a particular concern for legitimate interests of state and local governments, by *inter alia* limiting the Act's application to public safety positions, and excluding altogether elected officials, their non-civil-service personal staffs and advisers and policy-making appointees. *See supra* at 5.<sup>21</sup>

<sup>21</sup> In addition, in amending the ADEA in 1990 to make clear that discriminatory benefit plans need not affect non-fringe-benefit aspects of the employment relationship in order to be actionable, Congress delayed the application of the amendments to any state or local government that would need to change an existing law in



In sum, the Act was adopted to prevent and remedy arbitrary discrimination, and Congress crafted a carefully measured set of prohibitions and exceptions to achieve that end. The Act thus operates to enforce the commands of the Equal Protection Clause.

3. Throughout the ADEA/Eleventh Amendment litigation there has been much discussion of the significance to be assigned to the trio of cases in this Court upholding against Equal Protection Clause attacks, state and federal laws requiring mandatory retirement of certain classes of employees or officials at specified ages: *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (*per curiam*); *Vance v. Bradley*, 440 U.S. 93 (1979); and *Gregory v. Ashcroft*, 501 U.S. 452 (1991). That discussion has been generated by the suggestion that those cases establish that age discrimination in employment is, as a general matter, countenanced by the Equal Protection Clause, and that the ADEA thus has no Equal Protection Clause predicate. That suggestion is untenable.

a. In the first place, *Murgia*, *Vance*, and *Gregory* do not hold that government is free to impose on public employees as a class any and all age-based employment restrictions. To the contrary, *Murgia* and its progeny upheld a specific restriction (mandatory retirement) on unique occupations—police officers in *Murgia*, foreign service officers in *Vance*, and judges in *Gregory*—and no

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order to comply, see Pub. L. 101-433, § 105(c)(1), 104 Stat. 981 (1990), and allowed state and local governments to continue to apply non-complying disability benefit programs to any employees who did not elect to be covered by new programs that conformed with the statute. *Id.* § 105(c)(2), 104 Stat. 981-82. Congress also directed the Equal Employment Opportunity Commission, the Secretary of Labor, and the Secretary of Treasury to provide assistance and technical advice to assist States in complying with the provisions of the Act applicable to benefit programs. *Id.*, § 105(c)(3), 104 Stat. 982.

more. See *Murgia*, 472 U.S. at 314-15, nn. 7, 8 (emphasizing physical demands of police work); *Vance*, 440 U.S. at 98-102 (emphasizing features of the foreign service that make it desirable to ensure a steady stream of retirements in order to create promotional opportunities); *id.* at 103-06 (emphasizing unique demands placed on foreign service officers posted abroad); *Gregory*, 501 U.S. at 471-73 (explaining that individual judges whose performance may be deteriorating due to age cannot readily be identified or removed, thus making a categorical mandatory retirement provision a reasonable solution to the perceived problem).

b. In the second place, as the *Vance* Court emphasized, in an equal protection case that “involves a legislative classification contained in a statute,” the reasonableness of the legislature’s action cannot be assessed as in “ordinary civil litigation.” 440 U.S. at 110. *Murgia* and its progeny involved statutes or cognate state constitutional provisions. *Murgia* recognizes and draws on the commonplace that “the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary.” 427 U.S. at 314. “[S]uch imperfection [is accepted] because it is in turn rationally related to the secondary objective of legislative convenience.” *Vance*, 440 U.S. at 109.

As this Court put it in *Romer v. Evans*, 517 U.S. at 631, “[t]he Fourteenth Amendment’s promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another,” and the deferential mode of judicial review that applies where legislation is challenged under the Equal Protection Clause reflects an “attempt[] to reconcile the principle with the



reality." It is for these reasons that "[a person challenging a] legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance*, 440 U.S. at 111.<sup>22</sup>

*Gregory*, which involved a challenge to a provision in a state constitution, likewise presented a situation where the challenged provision of law necessarily was based on generalities, and where the lawmaking body—the people of Missouri—could not be called upon to produce a factual record supporting the law. As the *Gregory* Court explained, the voters, who alone are responsible for electing and reelecting judges, have little direct contact with the judges, and are not in a position to assess whether a particular judge's performance has deteriorated due to age. 501 U.S. at 472. Nor is the impeachment process—the only procedure for removing a judge—well designed to serve such a purpose. *Id.* Consequently, if the people of Missouri were to have any means of addressing the possible impact of age on judicial performance, they had no feasible way to deal with the matter on an individualized basis, but could only adopt a law "founded on a generalization." *Id.* at 473.

Whatever *Murgia*, *Vance* and *Gregory* may suggest about the validity under the Equal Protection Clause of statutory or constitutional provisions that adopt age distinctions—and, as we have explained, those cases do not

<sup>22</sup> See also *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) (a "[l]egislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data"); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 365 (1973) (a court reviewing a statutory classification must bear in mind that it "can be only dimly aware" of the facts on which the "legislative judgment" might be based); *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993); *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980).

suggest that all such provisions satisfy the Equal Protection Clause—the cases in no way suggest that the Equal Protection Clause allows a government employer to resort to stereotypical generalizations about older workers whenever and however the employer makes a decision that affects such a worker. Although the ADEA can, of course, be applied to challenge state and local laws (and properly so, *see infra* note 24), most cases under the statute do not involve a challenge to legislative action, but to discretionary employment decisions such as are made every day by supervisors and managers who have at their disposal specific facts that can inform their action and against which their action can be assessed.<sup>23</sup> *Murgia*, *Vance* and *Gregory* do not address such decision-making, and do not so much as intimate that, under the Equal Protection Clause, public personnel authorities are free to make employment decisions on the basis of stereotypes, ignoring facts readily at hand regarding the merits and capabilities of the individuals involved.

<sup>23</sup> In this respect, many of the government actions that can be challenged under the ADEA are like the action challenged in *Cleburne*—a city's decision to require a special use permit for a particular home for retarded persons—in that they do not involve the enactment of laws of general applicability, but rather the making of a more narrowly focused decision based on specific facts. Unlike review of legislation, in which the courts do not require the legislature to point to any factual record supporting its judgments, *see supra* at 37-38 and n.22, in *Cleburne* this Court found a violation of the Equal Protection Clause "[b]ecause . . . the record d[id] not reveal any rational basis for believing that the Featherston home would pose any special threat to the city's legitimate interests." 473 U.S. at 448 (emphasis added). The Court rested its decision squarely on the city's failure to establish on the record a sufficient justification for the specific action it had taken: the city's action was held unconstitutional because "this record does not clarify how . . . the characteristics of the intended occupants of the Featherston home rationally justify denying to those occupants what would be permitted to groups occupying the same site for different purposes." *Id.* at 450.

c. The results in *Murgia*, *Vance* and *Gregory*, and this Court's reasoning in those cases, also are crucially dependent on the fact that what was involved was the direct judicial authority to review state action under § 1 of the Fourteenth Amendment, and not the authority of Congress to legislate under § 5. "Section 5 of the [Fourteenth] Amendment empowers Congress to enforce [the equal protection] mandate, but *absent controlling congressional direction*, the courts have themselves devised standards for determining the validity of state legislation or other official action that is challenged as denying equal protection." *Cleburne*, 473 U.S. at 439-40 (emphasis added). And, the resulting rational basis standard that this Court applied to the mandatory retirement provisions in *Murgia*, *Vance* and *Gregory* is "a paradigm of *judicial restraint*," *FCC v. Beach Communications*, 508 U.S. 307, 314 (1993) (emphasis added), which reflects the "different institutional competences" of courts and legislatures, *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981). See also *Harris v. McRae*, 448 U.S. 297, 326 (1980) (in equal protection cases, making an independent appraisal of competing interests goes "beyond the judicial function"); *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979) ("The calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility"), *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (that a statutory line "might have been drawn differently . . . is a matter for legislative, rather than judicial, consideration").

Precisely because age requirements are "a matter for legislative, rather than judicial consideration," the deferential standard of judicial review that governed the Court's decisions in *Murgia*, *Vance* and *Gregory*—however those decisions may be understood—in no way delimits the

scope of Congress' authority to enact legislation to address problems of age discrimination in light of Congress' informed judgment as to the nature of those problems.

In *Murgia*, the Court did not have before it a record—or any means to *compile* a record—as to whether "the aged . . . have . . . experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." 427 U.S. at 313. In contrast, "extensive factfinding undertaken by the Executive Branch and Congress," *Wyoming*, 460 U.S. at 230-31, now has enabled Congress to make precisely the findings this Court was unable to make in *Murgia*. Employment actions that harm older workers, Congress has found, are "based in part on stereotypes unsupported by objective fact," *Wyoming*, 460 U.S. at 231, and "the available empirical evidence demonstrate[s] that arbitrary age lines [a]re in fact generally unfounded and that, as an overall matter, the performance of older workers [i]s at least as good as that of younger workers," *id.*

This is not to say that Congress having done what it has done, courts are obliged to apply heightened scrutiny to classifications based on age (although the point might be argued). Rather, it is to say that there is a fundamental distinction between the limits of *direct judicial equal protection scrutiny* of state laws, on the one hand, and the limits of *Congressional equal protection enforcement authority* on the other. It is within the Constitution's contemplation that when Congress brings its "specially informed legislative competence," *Katzenbach v. Morgan*, 384 U.S. at 656, to bear on a subject that is within the purview of the Equal Protection Clause, Congress quite properly can



arrive at conclusions and solutions the courts could not devise on their own.<sup>24</sup>

4. As we have shown, arbitrary and invidious discrimination violates the Equal Protection Clause, and the provisions of the ADEA are directed at such discrimination. *See supra* at 27-31. Thus there is every "reason to believe that many of the [employment actions] affected by the congressional enactment have a significant likelihood of being unconstitutional." *City of Boerne*, 521 U.S. at 532. That is indeed an understatement. On that basis alone, the statute must be sustained as a permissible exercise of Congress' § 5 power.

The ADEA's focus, moreover, assures the "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end" called for by *City of Boerne*, 521 U.S. at 520.<sup>25</sup> Because the ADEA

<sup>24</sup> Thus, the fact that the ADEA may invalidate certain state laws that would not be found by the courts to violate the Equal Protection Clause does not suggest that Congress has exceeded its § 5 authority. Having determined after extensive factfinding that employers in both the public and private sectors often rely on arbitrary stereotypes regarding older workers, it was well within Congress' power to require that, even where state statutes are involved, a State that wishes to make employment decisions on the basis of age should be "require[d] . . . to achieve its goals in a more individualized and careful manner than would otherwise be the case." *Wyoming*, 460 U.S. at 239. *See also Johnson v. Mayor and City of Baltimore*, 472 U.S. at 360-61.

<sup>25</sup> The measured nature of what Congress has undertaken in the ADEA can be illustrated by noting that *Murgia*, *Vance* and *Gregory* all would, or at least might, produce the same result under the ADEA as this Court reached under the Equal Protection Clause. In *Gregory*, the Court held that the challenged provision did not violate the ADEA, due to the Act's exception for "appointee[s] on the policymaking level." *See* 501 U.S. at 467, 465, 470. *Murgia* involved police positions, which presently are subject to a statutory exception applicable to many jurisdictions. *See* § 4(j), 2 U.S.C. § 623(j). Prior to the enactment of that exception, several courts

prohibits only discriminatory practices that are *not* based on a "reasonable factor other than age" and do *not* fall into any of the other statutory exceptions, *see supra* at 4-5, conduct that violates the Act is conduct of the kind that is likely to violate the Equal Protection Clause as well.<sup>26</sup> And, to the extent that the ADEA may subject state employers to liability in some instances for conduct that would not be found to violate the Equal Protection Clause, the statutory scheme falls well within "the power [of Congress under § 5] to . . . define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations," *J. A. Croson Co.*, 488 U.S. at 490 (opinion of O'Connor, J.) (emphasis in original).<sup>27</sup>

had sustained mandatory retirement of public safety officers under the ADEA's exception for bona fide occupational qualifications. *See* 8 L. Larson, *Employment Discrimination* § 131.06 at 131-19-20 (2d ed. 1999) (collecting cases). Finally, mandatory retirement provisions for foreign service officers, similar to those at issue in *Vance*, continue to be lawful notwithstanding the enactment of the ADEA. *See Strawberry v. Albright*, 111 F.3d 943, 947 (D.C. Cir. 1997), *cert. denied*, 118 S. Ct. 1164 (1998). *See also Vance*, 440 U.S. at 97 n.12 (noting that when Congress amended the ADEA in 1978, it "preserved the Foreign Service provision, at least for the time being, to allow the appropriate international relations committee to study the issue").

<sup>26</sup> It bears noting in this regard that even the disparate impact theory of liability, assuming *arguendo* that it is available under the Act, *see supra* note 20, is subject to the "reasonable factors" defense, *see supra* at 4, and thus, in the end, "is designed as a means to detect employment decisions that reflect 'inaccurate and stigmatizing stereotypes.'" *EEOC v. Francis W. Parker School*, 41 F.3d 1073, 1080 (7th Cir. 1994) (Cudahy, J., dissenting), *cert. denied*, 515 U.S. 1142 (1995), quoting *Hazen Paper Co.*, 507 U.S. at 610. *See also Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 661 (1989) (noting that proof of the elements of a disparate impact claim "would belie a claim by [employers] that their incumbent practices are being employed for nondiscriminatory reasons").

<sup>27</sup> Indeed, the ADEA is substantially more closely linked to remedying constitutional violations than several statutes that have



In sum, the ADEA "can[] be understood as responsive to, or designed to prevent, unconstitutional behavior." *City of Boerne*, 521 U.S. at 532. Congress therefore had authority under § 5 of the Fourteenth Amendment to authorize suits by employees against State employers for violations of the Act.

been upheld by this Court as permissible exercises of Congress' § 5 power. Under the Voting Rights Acts, the Court has sustained provisions that flatly prohibit state and local laws having a discriminatory impact, without allowing the State or local government any opportunity to defend those laws as serving a nondiscriminatory purpose. *City of Rome*, 446 U.S. at 175-77; *Lopez v. Monterey County*, 119 S. Ct. 693, 703 (1999). The Court also has sustained Congress' power to require "preclearance" of any change in voting practices in a jurisdiction covered by the Voting Rights Act of 1965, even if the change was dictated "by [a] State[] and ha[s] not been designated as [a] historical wrongdoer[] in the voting rights sphere." *Id.* In *Katzenbach v. Morgan*, one of the grounds on which this Court sustained a ban on literacy tests that operated to deny the vote to many members of New York City's Puerto Rican community was that, separate and apart from whether the legislation was "aimed at the elimination of an invidious discrimination in establishing voter qualifications," 384 U.S. at 653-54, Congress could act under § 5 to provide the Puerto Rican community with "enhanced political power [that] will be helpful in gaining non-discriminatory treatment in public services." *Id.* at 652. See *City of Boerne*, 521 U.S. at 528 (reaffirming that rationale). And in *Maher v. Gagne*, 448 U.S. 122 (1980), this Court upheld Congress' power under § 5 to require States to pay attorneys' fees in cases alleging constitutional claims in which the plaintiff has obtained a favorable disposition, even if "the plaintiff prevails [only] on a wholly statutory, non-civil-rights claim." *Id.* at 132.

## CONCLUSION

The decision of the Court of Appeals should be reversed.

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IN THE  
**Supreme Court of the United States**

J. DANIEL KIMEL, JR., *et al.*,

*Petitioners,*

v.

FLORIDA BOARD OF REGENTS, *et al.*,

*Respondents.*

UNITED STATES OF AMERICA,

*Petitioner,*

v.

FLORIDA BOARD OF REGENTS, *et al.*,

*Respondents.*

**On Writs of Certiorari to the  
United States Court of Appeals  
for the Eleventh Circuit**

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**QUESTION PRESENTED**

Does the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, compel States to surrender their Eleventh Amendment immunity and, if so, does it exceed Congress's enforcement authority under section 5 of the Fourteenth Amendment?



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## STATEMENT

The Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, does not permissibly require non-consenting States to submit to money-damages actions brought by individuals in federal court for at least two reasons. Congress failed to abrogate that immunity expressly, and at any rate lacked the power to do so under section 5 of the Fourteenth Amendment.

The States of Florida and Alabama do not make this claim lightly. The ADEA advances a commendable policy — non-discrimination against the elderly — and does so at the end of a lawmaking process that is as deserving of respect as each of the State lawmaking processes that it purports to displace. But, in this instance, the ADEA's attempted "expansion of Congress' powers" at the expense of a "corresponding diminution of State sovereignty," *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976), would work a reallocation of the Federal-State balance that is neither necessary nor appropriate.

Not just Florida and Alabama, but all 50 States, have provisions of their own that permit age-discrimination claims against the sovereign. "[T]each[ing]" by their "example," *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting), the States have passed laws and administrative regulations that exceed the rational-basis requirements of equal protection review, *see Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312-17 (1976) (*per curiam*); *Vance v. Bradley*, 440 U.S. 93, 98-112 (1979); *Gregory v. Ashcroft*, 501 U.S. 452, 470-73 (1991), and thus overprotect the constitutional rights of their elderly citizens. Nor in enacting the ADEA did Congress suggest anything to the contrary. It did not show, or even try to show, that the States have violated the constitutional rights of the elderly in the past or that they stand prepared to do so in the future.

On this record, Congress has no more "remedial" section 5 power, *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997), to re-define the constitutional rights of the elderly than it does to re-define the constitutional rights of the young. See *Oregon v. Mitchell*, 400 U.S. 112 (1970) (invalidating federal law reducing State voting-age requirements from 21 to 18). Accordingly, while States remain free to waive their sovereign immunity from age-discrimination claims on their own, just as all 50 States have done in their own tribunals under State law, see Appendix, and just as the Federal government has done in federal court under federal law, 29 U.S.C. § 633a(c), Congress has not abrogated, and cannot abrogate, the States' immunity for them.

### 1. History of State Age-Discrimination Laws.

Age-discrimination laws are a twentieth century innovation. Not until 1930, to our knowledge, did the first law of this type come into existence. It was a State law, and it specifically barred age discrimination by public employers. 1930 N.J. Laws ch. 104, § 1, p. 353 (codified as amended at N.J. Stat. Ann. § 52:14-11). Led by the example of New Jersey, other State legislatures soon followed course.

By 1974, 25 States had enacted such provisions, which by then applied to private and public employers alike. See Appendix. Then, as now, these State laws barred age discrimination in a variety of contexts (e.g., hiring, terms of employment, discharge), permitted injunctive and monetary relief, in some instances authorized punitive damages, and in most instances established separate civil rights commissions to ensure proper enforcement of these laws. See Appendix.

Today, all 50 States have age-discrimination provisions of one sort or another. *Id.* They cover most forms of public employment, and they all permit monetary relief against the sovereign. *Id.* Virtually all of them forbid the same practices

as the ADEA, and many of them offer more avenues of relief than the ADEA itself. See Appendix.

### 2. History of Age-Discrimination Claims Under the State and United States Constitutions.

Neither this Court nor a single one of the 50 State Supreme Courts has ever held that a State (or the Federal government) violated the equal protection requirements of the Fifth or Fourteenth Amendments by discriminating against the elderly through the exercise of its legislative or executive powers. In the three cases from this Court to address the issue, *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, *Vance v. Bradley*, 440 U.S. 93, and *Gregory v. Ashcroft*, 501 U.S. 452, the Court made clear that rational basis review governs such claims. Applying that highly deferential standard, the Court upheld the constitutionality of a Massachusetts statute requiring police officers to retire at age 50 (*Murgia*, 427 U.S. at 308, 314-17), a federal statute requiring foreign service officers to retire at age 60 (*Bradley*, 440 U.S. at 94-95), and a Missouri statute requiring judges to retire at age 70 (*Gregory*, 501 U.S. at 471-73).

While most States have equal protection provisions in their own Constitutions, and one State Constitution specifically bans discrimination on the basis of age, La. Const. art. I, § 3, just one State Supreme Court has found a violation of its Constitution in the context of age discrimination. In *Wilson v. Miwa*, 546 P.2d 1005 (Haw. 1976), the Hawaii Supreme Court found that a mandatory retirement plan for State university professors violated the Hawaii Constitution.

### 3. History of the ADEA.

Enacted in 1967, the ADEA initially covered just private sector age discrimination. It thus did not extend to federal employees, let alone State employees. Congress invoked its Interstate Commerce Clause powers in passing the law,



describing its "purpose" and "statement of findings" in the following manner:

(a) (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this Act to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

Pub. L. No. 90-202, § 2, 81 Stat. 602, (1967) (codified at 29 U.S.C. § 621). The 1967 Act also amended provisions of the Fair Labor Standards Act (FLSA) of 1938. *See* Pub. L. No. 90-202, § 7, 81 Stat. 604 (1967).

In 1974, Congress became the 26th legislature in the country to extend its age discrimination law to public employees. *See* Appendix. It did so through the Fair Labor Standards Amendments of 1974, which primarily amended substantive provisions of the FLSA. In the penultimate section of the 1974

Amendments, Congress extended the ADEA to most federal agencies (though not to itself) and to all 50 States. *See* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28(a)(2), 88 Stat. 74 (codified at 29 U.S.C. § 630(b)).

In making the ADEA applicable to the States in 1974, Congress did not invoke its remedial authority under section 5 of the Fourteenth Amendment. The text of the Act does not contain any claim, or even suggestion, that State governments had been or were about to violate the constitutional rights of their elderly citizens, let alone those as young as 40 years old. Nor does the legislative record. It contains no mention of section 5 and contains no findings or studies of any sort concerning State violations of the constitutional rights of the elderly.

Instead, the House and Senate Reports prepared in the course of enacting the 1974 Amendments invoke the watchwords of Interstate Commerce Clause authority, repeatedly referring to the impact of wage and employment laws on national commerce. According to the House Report, the law extends benefits "to workers engaged in commerce or in the production of goods for commerce, or employed in enterprises engaged in commerce or in the production of goods for commerce." H.R. Rep. No. 93-913, at 2 (1974). And according to the Senate Report, the "Committee believe[d] that there is no doubt that the activities of public sector employers affect interstate commerce and therefore that the Congress may regulate them pursuant to its power to regulate interstate commerce. Without question, the activities of government at all levels affect commerce." S. Rep. No. 93-690, at 24 (1974).

Very little of the 1974 Act, or the legislative debates that preceded it, even addressed the extension of the ADEA to government employees. The most commonly-expressed sentiment was this: "[E]mployees of State and local governments are entitled to the same benefits and protections in equal employment as the employees in the private sector of

the economy." 118 Cong. Rec. 15895 (1972) (statement of Sen. Bentsen) (quoting Senate Report). Just one of the 29 sections in the Act concerned the ADEA. See Pub. L. No. 93-259, § 28; see also 120 Cong. Rec. 8762-64 (1974). And even less of the legislative history occupied the subject. See *infra*.

In 1978, Congress expanded the protected class of employees from 40-65 to 40-70 and made it more difficult for employers to maintain mandatory age guidelines. The change, however, did not respond to unconstitutional State action, but apparently to this Court's 1976 decision in *Murgia* upholding a mandatory retirement age provision for police officers. According to a report issued by the House Committee on Aging: "If mandatory retirement because of age—the final step in the practice of age discrimination—is not to be declared unconstitutional by the Courts, then Congress should act to make such a practice illegal." House Select Comm. on Aging, 95th Cong., 1st Sess., *Mandatory Retirement: The Social and Human Cost of Enforced Idleness* 38 (Comm. Print 1977).

Today, the ADEA applies to employees over the age of 40 and no longer places a cap on the protected group at age 70. The law makes it unlawful for employers "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). And the law supplies a defense to employers who use age as a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. § 623(f)(1). In attempting to comply with these requirements, an "employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly," *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611 (1993), and the "rational basis standard" does not govern such inquiries, *Western Air Lines v. Criswell*, 472 U.S. 400, 420-23 (1985) (quotation omitted). The "policies and

substantive provisions of the Act apply with especial force in the case of mandatory retirement provisions." *Id.* at 410.

#### 4. Factual Background.

Three sets of individual claimants filed these ADEA actions, two from the State of Florida and one from the State of Alabama. In each instance, claimants sought monetary relief against their State employers and did so in federal court.

a. *Kimel v. Florida Board of Regents*. In 1995, 36 professors and librarians employed by Florida State University (FSU) and Florida International University (FIU) brought a disparate impact claim against the Florida Board of Regents, invoking both the ADEA, 29 U.S.C. § 623(a)(1), and State law, Fla. Stat. ch. 760 App. 40-41, 45. The claims stemmed from a 1991 collective bargaining agreement which allegedly required the State to make certain market adjustments to faculty salaries to make them more "commensurate with their experience . . . when compared with employees more recently hired." App. 42. During the 1993-94 fiscal year, the legislature appropriated funds to the Florida Board of Regents that it could use in its discretion for this purpose. App. 43. The Board of Regents in turn left it to the discretion of each State university whether it would make the salary increases or allocate the money to other programs. App. 43. When FSU and FIU chose not to allocate the funds for faculty raises, plaintiffs sued, arguing among other things that it would have "a disproportionate impact on" them. App. 44. The Board of Regents filed a motion to dismiss on Eleventh Amendment grounds. In rejecting the motion, the Northern District of Florida, Tallahassee Division, held that the ADEA contained a clear abrogation of State immunity and was a permissible exercise of Congress's section 5 power. Pet. App. 57a-60a.

b. *Dickson v. Florida Dep't of Corrections*. In 1996, plaintiff Wellington Dickson filed an action in the Northern District of Florida, Panama City Division, against his



employer, the Florida Department of Corrections, and several of its officials. App. 83. Filed under the ADEA and the Americans with Disabilities Act, the complaint alleged, among other things, that the State had improperly denied him promotions to lieutenant and sergeant on account of age, then retaliated against him when he filed a grievance over the denied promotions. Plaintiff sought injunctive relief as well as compensatory and punitive damages. See App. 97-98. The Florida Department of Corrections filed a motion to dismiss on Eleventh Amendment grounds, which the district court rejected. Pet. App. 72a-75a.

c. *MacPherson v. University of Montevallo*. In 1994, two associate professors filed an ADEA claim against their State employer, the University of Montevallo. They alleged that the State university had denied them promotions to full professor, appropriate appointments to committee assignments, higher salary and sabbatical leave all on account of their age, and that the university maintained a salary and evaluation system that “has had a disparate impact on older faculty members.” App. 22-25. Plaintiffs sought injunctive relief, including “promoting them to full professor,” as well as compensatory damages. App. 25. The State filed a motion to dismiss on Eleventh Amendment grounds. The Northern District of Alabama granted the motion, concluding that the ADEA was not a proper exercise of Congress’s enforcement authority. Pet. App. 64a-71a.

d. *Eleventh Circuit*. After consolidating the three appeals, the United States Court of Appeals for the Eleventh Circuit concluded that the ADEA does not abrogate the States’ sovereign immunity.

While “believ[ing] good reason exists to doubt that the ADEA was (or could have been properly) enacted pursuant to the Fourteenth Amendment,” Pet. App. 6a, Judge Edmondson chose to rest his decision on “the lack of unmistakably clear legislative intent” to abrogate the States’ immunity, *id.* Merely

because the ADEA includes “the States as employers,” he observed, “does not show an intent that the States be sued by private citizens in federal court — the kind of suit prohibited under the Eleventh Amendment.” *Id.* at 11a. And that is particularly true here, he concluded, since the amendment permits an action against a State only in a court of “competent jurisdiction.” *Id.* at 10a n.11 (quotation omitted). Under *Employees of the Department of Public Health and Welfare v. Missouri Public Health Department*, 411 U.S. 279, 281 (1973), he reasoned, “a federal court lacks ‘competent jurisdiction’ if the Eleventh Amendment prohibits the suits against the State.” *Id.*

Judge Cox did not reach the clear-statement question. He instead concluded that “Congress lacks the constitutional authority to abrogate the states’ Eleventh Amendment immunity to suit in federal court.” *Id.* at 42a. In accordance with *City of Boerne v. Flores*, he concluded that “legislation enacted pursuant to § 5 must hew to the contours of Supreme Court-defined Fourteenth Amendment rights unless the legislation is a proportional response to a documented pattern of constitutional violation.” *Id.* at 48a. The ADEA, he determined, did not meet that test. It is the “very essence of age discrimination” under the ADEA “for an older employee to be fired because the employer believes that productivity and competence decline with old age.” *Id.* at 51a (quoting *Hazen Paper Co.*, 507 U.S. at 610). But under the Equal Protection Clause, he reasoned, the Supreme Court has upheld mandatory retirement laws that use age as a proxy for productivity — where “the policymaker’s perception that mental acuity and physical stamina decline with age was rational basis enough to support the line between those under the retirement age and those over it.” *Id.* at 50a (citations omitted). He also observed that “State action that has a disparate impact on old workers probably does not violate the Equal Protection Clause, but it can violate the ADEA.” *Id.* at 51a (citations omitted). Chief



Judge Hatchett dissented from each of his colleagues' positions. *Id.* at 15a-41a.

### SUMMARY OF ARGUMENT

I. In attempting to extend the ADEA to the States through the Fair Labor Standards Amendments of 1974, Congress failed to make its "intention to abrogate the States' immunity unmistakably clear in the language of the statute." *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199, 2205 (1999). The ADEA's enforcement provision just permits individuals to bring actions against employers in "any court of competent jurisdiction," 29 U.S.C. § 626(c)(1), a jurisdictional phrase that *Employees of the Department of Public Health and Welfare v. Missouri Public Health Department*, 411 U.S. at 285, holds does not establish the "clear language that the constitutional immunity was swept away."

Nor does another provision of the ADEA — 29 U.S.C. § 626(b) — supply the missing specificity. It states that "[t]he provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures" of several parts of the FLSA. One such subsection provides that "[a]n action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction." 29 U.S.C. § 216(b). But the continued existence of two jurisdictional provisions — one in the ADEA itself (29 U.S.C. § 626(c)(1)) and another in the FLSA — by itself suggests that Congress did not mean to supplant the ADEA provision with the FLSA one. Any doubt on this score, moreover, is laid to rest by the specific language of the FLSA jurisdictional provision. By its terms, it just allows actions "prescribed in either of the preceding sentences," not one of which relates to an ADEA action. At most, anyway, this jurisdictional provision just amounts to "[a] general authorization for suit in federal court," which does not satisfy

the requirements of *Dellmuth v. Muth*, 491 U.S. 223, 231-32 (1989), or *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (1985).

II. The ADEA also does not constitute permissible enforcement legislation under section 5 of the Fourteenth Amendment.

A. In purporting to "remedy" unconstitutional State discrimination against the elderly, *City of Boerne v. Flores*, 521 U.S. at 525, the ADEA does not proscribe what the Equal Protection Clause proscribes. Equal protection review in this setting receives rational basis scrutiny, compelling the rejection of such claims unless the government conduct "is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." *Vance v. Bradley*, 440 U.S. at 97. ADEA claims, by contrast, receive judicial scrutiny that "is inconsistent with" and "significantly different" from "rational basis" review. *Western Air Lines v. Criswell*, 472 U.S. at 421-22. The ADEA thus cannot be sustained on core section 5 grounds — that it supplies a remedy or forum for vindicating constitutional violations.

B. The ADEA also cannot be sustained as a permissible exercise of Congress's conditional, prophylactic authority to prohibit what the Constitution does not.

1. The law, first of all, cannot be supported by a power that Congress never invoked. Because this prophylactic authority "imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority," the Court has "not quickly attribute[d] to Congress an unstated intent to act under" it. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 16 (1986). Having explicitly relied on its authority to regulate interstate commerce in passing the ADEA, 29 U.S.C. § 621(a)(4), and having given neither the States nor the Courts any indication (or warning) to

the contrary, Congress may not suddenly invoke its enforcement authority to sustain this law.

2. The law also lacks the necessary “predicate” “pattern or practice of unconstitutional conduct” for invoking this unique authority. *Florida Prepaid*, 119 S. Ct. at 2207 (quotation omitted). In passing the ADEA, Congress did not identify any pattern of unconstitutional State action, or for that matter even a single instance of such conduct.

Nor can such a record be contrived today. Not only are rational basis challenges “virtually unreviewable” as a matter of theory, *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 316 (1993), but as a matter of historical fact the Court at no time from 1868 to the present has found that the States violated these requirements. And on three occasions, the Court expressly rejected any such notion. See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307; *Vance v. Bradley*, 440 U.S. 93; *Gregory v. Ashcroft*, 501 U.S. 452. Add to this the fact that all 50 States currently regulate age discrimination by public employers in some manner, and it becomes clear that there is no tenable “evidence that unremedied [age discrimination] by States [has] become a problem of national import.” *Florida Prepaid*, 119 S. Ct. at 2207-08.

3. But even if such a record could be established, the ADEA is “so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.” *City of Boerne*, 521 U.S. at 532. Consider the differences between judicial review of an ADEA claim and an equal protection one: (1) The ADEA requires individualized “case-by-case” determinations as to whether an elderly employee is qualified for the job, *Western Air Lines*, 472 U.S. at 411, not the “generalization” that “physical and mental capacity sometimes diminish with age,” *Gregory*, 501 U.S. at 472; (2) the ADEA frequently places the burden of proof on States to justify their conduct, *Western Air Lines*, 472 U.S. at 416 n.24, not the

claimant, *Murgia*, 427 U.S. at 314; (3) the ADEA requires an “objective justification in a court of law,” *Western Air Lines*, 472 U.S. at 419, not a “virtually unreviewable” justification (*Beach Communications*, 508 U.S. at 316) that could “reasonably be conceived to be true,” *Bradley*, 440 U.S. at 111; (4) the ADEA frequently requires proof “that there is no acceptable alternative . . . with less discriminatory impact,” *Western Air Lines*, 472 U.S. at 416 n.24 (quotation omitted), not the recognition that the State need not choose the “best means to accomplish this purpose,” *Murgia*, 427 U.S. at 316. In the end, rather than being calibrated to correct rational-basis violations, the ADEA borrows the same framework and burdens associated with the heightened scrutiny applicable to discrimination claims based on race, gender or religion. The law, in this respect and many others, represents an impermissibly disproportionate exercise of section 5 authority.

C. Nor has the Court ever upheld a prophylactic exercise of section 5 power in the context of non-suspect classifications. Still less has it done so in the context of a record revealing no State violations as well as the existence of 50 State anti-discrimination provisions, half of them pre-dating ADEA’s extension to the State. Under these circumstances, the ADEA has no more connection to remediating Fourteenth Amendment violations than the youth-based protections invalidated in *Oregon v. Mitchell*, the RFRA in *City of Boerne*, the Lanham Act in *College Savings*, or the Patent Remedy Act in *Florida Prepaid*.

A contrary view not only would abandon precedent but also would have no discernible stopping point. Only a most unimaginative legislature would be constrained from using this theory to nationalize all manner of equal protection, procedural due process, substantive due process, or incorporated Bill of Rights’ standards — particularly if, as the United States claims (U.S. 40), judicial review of prophylactic section 5 legislation “is as deferential as” review of Article I legislation. No doubt



the Federal government may lead by example in regulating the rights of its own employees, as it eventually did in the ADEA, or even more so, by waiving *its* immunity from State-law anti-discrimination actions filed in State court. But it cannot be the case that congressional self-restraint is in essence the only restriction that the Constitution's "limited and enumerated powers" (*New York v. United States*, 505 U.S. 144, 156 (1992)) place on exercising such broad lawmaking authority over the States.

### ARGUMENT

At the outset, it is useful to clarify the parameters of dispute. Neither Florida nor Alabama has challenged Congress's authority under the Interstate Commerce Clause to regulate State employees under the ADEA. See *EEOC v. Wyoming*, 460 U.S. 226 (1983). Nor have they challenged an individual's authority to bring an injunction action against State officials in federal court, see *Ex Parte Young*, 209 U.S. 123 (1908), or the Federal government's authority to bring a claim for injunctive and monetary relief against States in federal court, see *Employees of the Dep't of Public Health and Welfare v. Missouri Public Health Dep't*, 411 U.S. 279, 286 (1973). Neither plaintiffs nor the Federal government has invoked the Spending Clause to justify these actions. Nor have they disputed that Congress may rely only on the Fourteenth Amendment, not the Commerce Clause, to abrogate the States' constitutional immunity from suit. See *Seminole Tribe v. Florida*, 517 U.S. 44, 59 (1996).

What is left is a narrow, though no doubt important, dispute over whether Congress permissibly abrogated the States' immunity from individual money-damages actions. It did not. Before "compel[ling] States to surrender their sovereign immunity," Congress must "unequivocally express its intent" to revoke that constitutional right, then establish that it "had the power to" do so. *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199, 2201

(1999) (quoting *Seminole Tribe*, 517 U.S. at 55). The ADEA, however, satisfies neither requirement, and accordingly these claims should be dismissed.

### I. THE ADEA DOES NOT EXPLICITLY ABROGATE THE STATES' ELEVENTH AMENDMENT IMMUNITY.

Recognizing that "the States' immunity from suit is a fundamental" attribute of "sovereignty," *Alden v. Maine*, 119 S. Ct. 2240, 2246 (1999), and that the immunity is designed to preserve the "constitutional balance between the Federal Government and the States," *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985), the Court has not lightly inferred abrogations of it. Only an "intention to abrogate the States' immunity unmistakably clear in the language of the statute" will suffice. *Florida Prepaid*, 119 S. Ct. at 2205 (quotation omitted). Whether stated as an "unmistakably clear" requirement, *Atascadero State Hosp.*, 473 U.S. at 242, as an "unequivocal and textual" requirement, *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989), or merely as a "clear statement" rule, *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) (quotation omitted), the point is the same: Congress must leave no doubt about its intentions.

In purporting to extend the ADEA to the States through the Fair Labor Standards Amendments of 1974, however, Congress simply did not satisfy this "strict standard." *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990). Some components of the 1974 amendment, to be sure, are clear. No doubt Congress extended coverage of the ADEA's substantive provisions to public employers by amending the term "employer" to include "a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State." See Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28(a)(2), 88 Stat. 74 (codified at 29 U.S.C. § 630(b)). And no doubt the amendment permits all employees to "bring a civil action in



any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act.” 29 U.S.C. § 626(c)(1).

But when it comes to abrogating the States’ sovereign immunity, doubt still lingers on several fronts. The first problem is the phrase “any court of competent jurisdiction.” In *Employees of the Department of Public Health and Welfare v. Missouri Public Health Department*, the Court addressed whether the FLSA, in Justice Douglas’s words, “brought the States to heel, in the sense of lifting their immunity from suit in a federal court.” 411 U.S. at 283. Acknowledging “no doubt that Congress desired to bring under the Act” certain State employees, the Court nonetheless concluded that the enforcement provision — “Action to recover such liability may be maintained in any court of competent jurisdiction” (*id.*) — was insufficiently clear to abrogate the States’ Eleventh Amendment immunity. Federal court actions were still permissible when pursued by the Federal government, the Court acknowledged, *id.* at 286, and the FLSA might still “permit[ ] suit[s] in the [State] courts,” *id.* at 287. But the opaque phrase “any court of competent jurisdiction” did not establish the “clear language that the constitutional immunity was swept away.” *Id.* at 285.

Seconding this conclusion is *Kennecott Copper Corp. v. State Tax Comm’n*, 327 U.S. 573, 577-79 (1946), which rejected the same abrogation argument that *Employees* did. There, the Court held that a State’s purported waiver of immunity “in any court of competent jurisdiction” did not satisfy these clear-statement requirements. *See also College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 119 S. Ct. 2219, 2226 (1999) (a State does not “consent to suit in federal court merely by stating its intention to ‘sue and be sued,’ or even by authorizing suits against it ‘in any court of competent jurisdiction’”) (citations omitted).

The ADEA contains an identically-worded enforcement provision. As in *Employees* and as in *Kennecott Copper*, it just permits claims in “any court of competent jurisdiction.” 29 U.S.C. § 626(c)(1). The provision, then, cannot do for the ADEA what it so clearly failed to do for the abrogation claims in *Employees* or *Kennecott*.

Nor does it change matters that Congress responded to the *Employees* decision by rewording the FLSA in 1974 to say that an action “may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction.” 29 U.S.C. § 216(b). Trying to capitalize on an ADEA provision that says “[t]he provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided” in several different subsections of the FLSA, including 29 U.S.C. § 216(b), petitioners argue (U.S. 14-15; Pet. 17-18) that the FLSA-motivated response to *Employees* covers the ADEA as well. They are right that the change is relevant, but the inference they draw from it is exactly backwards.

The proposed interpretation requires a reading of the ADEA that creates *two* court enforcement provisions applicable to the States — the FLSA provision noted above and the still-extant enforcement provision in the ADEA itself, which Congress did not delete in 1974. The simultaneous existence of both provisions, ostensibly for the same statute, sows more doubt than it removes. Far from eliminating the ambiguity left by the perpetuation of the *Employees* language, the existence of another provision referring to federal courts only multiplies the reader’s confusion. The side-by-side provisions are inscrutable, and efforts to discern their joint meaning are hardly assisted by the extensive page turning through the United States Code required to bring all of the provisions allegedly bearing on this inquiry — 29 U.S.C. § 626(b) & (c)(1), 29 U.S.C. § 630(b), 29 U.S.C. § 216(b), 29 U.S.C. § 203(x), 29 U.S.C. § 255(d) — together. The two provisions in the end

are still “susceptible of . . . interpretations that do not authorize monetary relief” — for example, that the ADEA incorporates some FLSA provisions but not those expressly covered in the ADEA itself — and that is enough to defeat a claim of abrogation. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992).

Add to this ambiguity a second one, and it becomes clear that Congress still has not established the textual specificity that precedent demands. By its express terms, § 216(b) of the FLSA just authorizes federal-court actions “to recover the liability prescribed in either of the preceding sentences” of the subsection. The “preceding sentences,” in turn, merely create employer liability for violations of the minimum wage and hour provisions of the FLSA, 29 U.S.C. §§ 206, 207, and for violations of the FLSA’s retaliatory discharge prohibition, 29 U.S.C. § 215(a)(3). Even if the FLSA’s jurisdictional provision sufficed to abrogate State immunity for these FLSA claims, it is not clear why the ADEA’s alleged “incorporation” of this language waives State immunity from other claims, to say nothing of separate ADEA claims. It may be true in other words that § 626(b) of the ADEA incorporates certain “powers, remedies, and procedures” of the FLSA. But that is not to say that each of the many provisions identified in those sections is pertinent to ADEA actions or, worse, that they displace all existing ADEA jurisdictional provisions that Congress itself chose not to delete. Nor does *Seminole Tribe v. Florida* alter this conclusion. Unlike the ADEA, that statute contained “numerous references to the ‘State’” in the enforcement provision itself. 517 U.S. 44, 57 (1996).

All of this, however, is prelude to a final flaw in petitioners’ arguments. Even an accounting of these various provisions that compels the view that the ADEA generally permits actions against States in federal court does not suffice. As the Court held in *Atascadero*, and “reaffirm[ed]” in *Dellmuth*, “[a] general authorization for suit in federal court is not the kind of

unequivocal statutory language sufficient to abrogate the Eleventh Amendment.” 491 U.S. at 231-32 (quoting *Atascadero*, 473 U.S. at 246). The same “imperfect confidence” that *Dellmuth* expressed about abrogation of its jurisdictional provision — one may “bring a civil action . . . in any State court of competent jurisdiction or in a district court of the United States” — deserves equal expression here. As these cases make clear, it is one thing to require States to comply with the substantive provisions of a federal law and to grant a “general authorization for suit in federal court.” But it is quite another to grant that authority, then revoke the State’s right to assert one of the defenses — sovereign immunity — to those claims. At most, petitioners’ contrary arguments (U.S. 12-17; Pet. 14-20) “lend[] force to the inference that the States were intended to be subject to damages actions for violations of the [ADEA]. But such a permissible inference, whatever its logical force, would remain just that: a permissible inference” — not the “unequivocal declaration” that precedent demands. 491 U.S. at 232.

In addition to “assur[ing] that the legislature has in fact faced [the policy], and intended to bring [it] into issue,” *Will*, 491 U.S. at 65 (quotation omitted), the clear-statement rule places no great hardship on Congress. “When measured against” Congress’s “explicit consideration of abrogation of the Eleventh Amendment” in other laws, the ADEA’s “treatment of the question appears ambiguous at best.” *Dellmuth*, 491 U.S. at 230. That is particularly true here since Congress has shown its ability to abrogate state immunity scrupulously in another statute barring “discrimination” “on the basis of age.” 42 U.S.C. § 6102. Applicable to federally-funded programs, the Age Discrimination Act of 1975 contains precisely the kind of unequivocal abrogation the Court has long demanded. *See* 42 U.S.C. § 2000d-7(a)(1) (“A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973,



title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964 or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.”). *See also* 5 U.S.C. § 296(a) (“Any State . . . shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court . . . for infringement of a patent.”); 42 U.S.C. § 12202 (“A State shall not be immune under the eleventh amendment” from a claim under the Americans with Disabilities Act). Congress thus had plenty of guidance as to which provisions are “unequivocal,” *see supra*, and which are not, *see Employees*. This one is not, and the Court should so hold.

## II. THE ADEA IS NOT APPROPRIATE ENFORCEMENT LEGISLATION UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT.

### A. The Section 5 Power Is A Remedial One, And Must Be Exercised In A Way That Is Congruent With And Proportional To Constitutional Wrongs.

“Section 1 . . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”

U.S. Const. amend. XIV, § 1.

“Section 5. Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”

U.S. Const. amend. XIV, § 5.

Section 5 combines a broad power (to pass “appropriate legislation”) with a broad limitation on that power (to do so only when “enforc[ing] . . . the provisions of this article”). Consistent with the “design of the Amendment and the text of § 5,” *City of Boerne v. Flores* makes clear that the enforcement power is a “remedial” one. 521 U.S. 507, 519 (1997). So do cases decided before *City of Boerne*, *see South Carolina v.*

*Katzenbach*, 383 U.S. 301, 326 (1966) (describing the enforcement power as a “remedial” one), and so do cases decided after it, *see Florida Prepaid*, 119 S. Ct. at 2206 (“Congress’ enforcement power is ‘remedial’ in nature”), *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 119 S. Ct. 2219, 2224 (1999) (“the term ‘enforce’ is to be taken seriously . . . the object of valid § 5 legislation must be the carefully delimited remediation or prevention of constitutional violations”).

In accordance with the remedial nature of section 5, judicial review of enforcement legislation “must first identify the Fourteenth Amendment ‘evil’ or ‘wrong’ that Congress intended to remedy.” *Florida Prepaid*, 119 S. Ct. at 2207 (quoting *City of Boerne*, 521 U.S. at 525); *see Fitzpatrick v. Bitzer*, 427 U.S. 445, 453 (1976) (§ 5 “stand[s] behind,” not in front of, the “imperatives” of § 1). The Court then asks whether the legislation merely bans violations of the Fourteenth Amendment as the Court has defined them, or exceeds those strictures in order prophylactically to “remedy” past violations or “prevent” future ones.

Congress has “much deference” (*City of Boerne*, 521 U.S. at 536) in the first respect. In passing legislation that just provides remedies for ongoing State action that itself violates the Fourteenth Amendment, Congress poses no threat to the national separation of powers and specifically “the province of the Judicial Branch . . . to say what the law is,” *id.* at 536 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). Nor, so long as there is some “proportionality” between the underlying violation and the law’s remedy, does such legislation threaten the federal separation of powers by “contradict[ing] vital principles necessary to maintain” the “balance” between the States and the National Government. *Id.* Accordingly, whether exercising its right to prohibit State action that violates the Fourteenth Amendment, *see, e.g., Ex Parte Virginia*, 100 U.S. 339 (1879), to establish a cause of



action for violations of the Amendment, *see* 42 U.S.C. § 1983, or to provide a forum for constitutional claims, *see Strauder v. West Virginia*, 100 U.S. 303 (1879), Congress has broad power to legislate in this regard.

Section 5 legislation that prohibits what the Constitution does not, however, is another matter. Such laws invariably present the twin risks of parliamentary supremacy, in which the legislature assumes plenary authority to define the outer limits of its own power and plenary authority to bend State sovereign functions to congressional will. Before upholding such legislation, as a result, the Court imposes three requirements: (1) a stated "intent to act under its authority to enforce the Fourteenth Amendment," *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. at 16; (2) a predicate "pattern or practice of unconstitutional conduct," *City of Boerne*, 521 U.S. at 534, *Florida Prepaid*, 119 S. Ct. at 2207; and (3) a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end," *City of Boerne*, 521 U.S. at 519-20. Ultimately, the "appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one." *Id.* at 530-32.

## **B. The ADEA Cannot Be Sustained As Traditional Enforcement Legislation That Merely Prohibits Constitutional Violations.**

### **1. Alleged Discrimination Against The Elderly Receives Rational Basis Review.**

Not until 1976, two years *after* Congress extended the ADEA to the States, did the Court first address whether alleged discrimination against the elderly might violate the Constitution. *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976). In rejecting an equal-protection challenge to a State law requiring police officers over the age

of 50 to retire, *Murgia* noted that the officers had not been "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process," *id.* at 313 (quoting *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)), and thus did not "constitute a suspect class for purposes of equal protection analysis," 427 U.S. at 313. The Court therefore did not review the classification with the "degree of critical examination" that strict scrutiny requires. *Id.* at 314. Instead, it noted that "old age" simply "marks a stage that each of us will reach if we live out our normal span," *id.* at 313, that "physical ability generally declines with age," *id.* at 315, and that "mandatory retirement at 50 serves to remove from police service those whose fitness for uniformed work presumptively has diminished with age," *id.* at 315. Under these circumstances, the Court held that the law "clearly is rationally related to the State's objective." *Id.* The Court noted that the State might have sought to "determine fitness more precisely through individualized testing," but stressed that, where rational basis review is applicable, the State need not act with that degree of precision. *Id.* at 316.

Three years later, in *Vance v. Bradley*, 440 U.S. 93 (1979), the Court reviewed a similar challenge, this time to a federal law that required foreign service officers to retire at age 60. Claimants argued that the requirement was "arbitrary" because it "impose[d] the burden only on those over age 60," and failed to account on a case-by-case basis for "those who are over 60 but quite able to perform." *Id.* at 102-03 n.20. The Court observed at the outset that it was "quite reluctant" to strike laws on this ground. *Id.* at 97.

The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch

has acted. Thus, we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.

*Id.* at 97 (footnote omitted). Because the claimants could not "demonstrate that Congress has no reasonable basis for believing that conditions overseas generally are more demanding than conditions in the United States and that at age 60 or before many persons begin something of a decline in mental and physical reliability," the Court upheld the law. *Id.* at 111. "It makes no difference," the Court added, "that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety." *Id.* at 112 (quoting *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 357 (1916)).

In the last case in this trilogy, *Gregory v. Ashcroft*, 501 U.S. 452 (1991), addressed a mandatory retirement provision for State judges at age 70. Acknowledging that the "generalization" on which the law was based — that "physical and mental capacity sometimes diminish with age," *id.* at 472 — is "far from true" for all 70-year-old judges, "is probably not true" for "most" judges, and "may not be true at all," the Court nonetheless upheld the provision. *Id.* at 473. The claimants could not establish, the Court held, that the "facts on which the classification is apparently based could not reasonably be conceived to be true by the . . . decisionmaker," and that was enough to defeat the claim. *Id.* at 473 (quoting *Bradley*, 440 U.S. at 111).

Other decisions in other contexts confirm that rational basis review is "a paradigm of judicial restraint," and, where applicable, makes State action "virtually unreviewable" under the Constitution. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314 (1993). Under these cases, as under the *Murgia* trilogy itself, it is well settled that courts must "accept a

legislature's generalizations even when there is an imperfect fit between means and ends." *Heller v. Doe*, 509 U.S. 312, 320 (1993); see, e.g., *City of Dallas v. Stanglin*, 490 U.S. 19, 26 (1989) ("A state does not violate the Equal Protection Clause merely because classifications made by its laws are imperfect.") (quoting *Dandridge v. Williams*, 397 U.S. 471, 485-86 (1970)). It is equally well settled that, under rational basis review, a "legislature or governing decisionmaker" need not "actually articulate at any time the purpose or rationale supporting its classification," *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992), as long as there is "any reasonably conceivable state of facts that could provide a rational basis for the classification," *Beach Communications*, 508 U.S. at 313. Accordingly, the actual motive of the decisionmaker "is entirely irrelevant for constitutional purposes." *Id.* at 315; see *Heller v. Doe*, 509 U.S. at 320 ("a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data"); *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (constitutionally irrelevant what motive "in fact underlay" challenged government decision). The standard of review, moreover, is no different regardless whether "the classification is drawn by legislative mandate" or "by administrative action." *Nordlinger*, 505 U.S. at 16 n.8; see also *Allegheny Pittsburgh Coal Co. v. Webster County*, 488 U.S. 336, 343-44 (1989).

These decisions make it clear that government rarely if ever violates the Constitution by treating individuals differently on the basis of age. If employment decisions subject to rational basis review need only be justified by some rational justification after the fact, see, e.g., *Beech Communications*, 508 U.S. at 313-15; *Nordlinger*, 505 U.S. at 16-18, and if the generalization that "physical and mental capacity sometimes diminish with age" (*Bradley*, 440 U.S. at 111-12) is rational enough to support across-the-board age classifications both in jobs requiring mental acuity (see



*Gregory*, 501 U.S. at 473) and those requiring physical strength (see *Murgia*, 427 U.S. at 314-15), then it is difficult to imagine an act of age discrimination in employment that would rise to the level of a constitutional violation.

## **2. Judicial Review Under The ADEA Is Far More Rigorous Than It Is Under The Equal Protection Clause.**

By any measure, it cannot tenably be argued that the ADEA and the Equal Protection Clause apply the same level of scrutiny to alleged State discrimination against the elderly. According to the Court, legislative and executive branch decisions in this area receive rational-basis review, *Gregory*, 501 U.S. at 473, *Bradley*, 440 U.S. at 97, *Murgia*, 427 U.S. at 313-15, and will not be invalidated unless they are "palpably arbitrary" and no conceivable set of facts supports them, *Nordlinger*, 505 U.S. at 18. Yet, according to Congress's purported efforts to enforce that provision, ADEA requires judicial scrutiny of State action that "is inconsistent with" and "significantly different" from "rational basis" review. *Western Air Lines v. Criswell*, 472 U.S. 400, 421-22 (1985).

*Western Air Lines* specifically rejects the contention that the two standards are one and the same:

[The employer] contended below that the ADEA only requires that the employer establish "a rational basis in fact" for believing that identification of those persons lacking suitable qualifications cannot occur on an individualized basis. This "rational basis in fact" standard would have been tantamount to an instruction to return a verdict in the defendant's favor. Because that standard conveys a meaning that is significantly different from that conveyed by the statutory phrase "reasonably necessary," it was correctly rejected by the trial court.

472 U.S. at 421. Accordingly, while "Congress expressly decided that problems involving age discrimination in

employment should be resolved on a 'case-by-case basis' by proof to a jury" under the ADEA, *id.* at 422, application of the rational basis standard carries no such requirement. Indeed, under the constitutional test, a jury's "'inquiry is at an end'" with the "articulation of any 'plausible [reason]' for the employer's decision." *Id.* at 422 n.36 (quoting *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. at 179).

The ADEA in the end cannot be justified on the ground that it merely asks the States to do what the Equal Protection Clause already requires. Far from applying the same standards of care, the two mandates are worlds apart in their substantive rules, allocation of the burden of proof, system of adjudication and ultimate application.

## **C. The ADEA Is Not "Proper Prophylactic" Legislation.**

### **1. The ADEA's Extra-Constitutional Requirements Cannot Be Justified By A Power That Congress Never Invoked.**

Nor is the ADEA a permissible "prophylactic" law that "prohibits conduct which is not itself unconstitutional." *City of Boerne*, 521 U.S. at 518 (citation omitted). As an initial matter, Congress may not rely on section 5 to sustain the ADEA because it never invoked that authority in the text of the statute, or for that matter anywhere else. From 1967 to the present, the ADEA has turned on Congress's Interstate Commerce Clause powers, not those under the Fourteenth Amendment. For this reason alone, the legislature's assertion of authority to condemn what the Constitution does not should be rejected.

Just as the "term 'enforce' is to be taken seriously" in reading section 5, *College Savings*, 119 S. Ct. at 224, so too is the consequence of exercising that authority prophylactically. Unlike the traditional exercise of the enforcement power where Congress merely supplies remedies for what the Fourteenth



Amendment already proscribes, this additional authority turns on Congress's "predicate" judgment that the States have violated the constitutional rights of their citizens or are on the verge of doing so. *Florida Prepaid*, 119 S. Ct. 2210-11. That is a serious charge, and one that the Courts do not, and should not, lightly infer. Because this unique authority "imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority," including a state's sovereign immunity, the Court has "not quickly attribute[d] to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. at 16. *See id.* at 35-36 (White, J., joined by Brennan & Marshall, JJ., dissenting in part) ("Congressional action under the Enforcement Clause of the Fourteenth Amendment . . . has very significant consequences, and given these ramifications, it should not be lightly assumed that Congress acted pursuant to its power under section 5. Nothing in the statutory language refers to the Fourteenth Amendment.").

The Court's "previous cases are wholly consistent with that view, since Congress in those cases expressly articulated its intent to legislate pursuant to § 5." 451 U.S. at 16 (citing *Katzenbach v. Morgan*, *Oregon v. Mitchell*, and *Fitzpatrick v. Bitzer*). *Dicta* to the contrary in *EEOC v. Wyoming*, 460 U.S. 226, 243 n.18 (1983), is just that, and at all events the decision elsewhere acknowledges the requirement that the Court "be able to discern some legislative purpose or factual predicate that supports the exercise of that power," *id.* Neither requirement, it turns out, has been met here. As the ADEA's statement of findings and purpose reveal, the law represents a paradigmatic exercise of Congress's authority under the Interstate Commerce Clause. *See* 29 U.S.C. § 621(a)(4) ("the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce"). *See also* 8 L. Larson, *Employment Discrimination*, § 121.06[5][b] (2d

ed. 1999) ("[N]owhere does the ADEA make mention of the Fourteenth Amendment, and . . . the ADEA's 1974 Amendments adding state and local governments to the list of liable employers were enacted pursuant to an amendment to [FLSA], which grounds itself in the Commerce Clause."). Unlike the RFRA in *City of Boerne*, the Patent Remedy Act in *Florida Prepaid*, or the Voting Rights Act in *South Carolina and Morgan*, the legislative record reverberates with silence concerning section 5, the Fourteenth Amendment or equal protection. While repeated references to interstate commerce dot the legislative landscape, not a single utterance mentions section 5 in general or State violations of equal protection in particular. Petitioners agree (Pet. 29 n.18) that Congress failed to "make any explicit reference to the Fourteenth Amendment" in extending the ADEA to the States. And the United States only casually rebuts the point (U.S. 18 n.18) with a reference to a floor speech by Senator Bentsen, which references a Title VII report, which in turn references among many other things the Fourteenth Amendment. That is inadequate.

Just last Term, *Florida Prepaid* applied this reasoning in declining to consider whether the Patent Remedy Act could be justified on section 5 grounds as an effort to remedy or prevent violations of the Just Compensation Clause. In the Court's words:

There is no suggestion in the language of the statute itself, or in the House or Senate Reports of the bill which became the statute, that Congress had in mind the Just Compensation Clause of the Fifth Amendment. Since Congress was so explicit about invoking its authority under Article I and its authority to prevent a State from depriving a person of property without due process of law under the Fourteenth Amendment, we think this omission precludes consideration of the Just Compensation Clause as a basis for the Patent Remedy Act.

119 S. Ct. at 2208 n.7.

This rule, and its application here, also make abundant sense. Neither States, their citizens, nor the Congress have anything to gain from hiding alleged State violations of the Constitution. That is all the more true in view of the principal explanation for *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) — that States protect their self-interest in Congress through the national political process — and in view of the zero-sum reality that Congress's gain under section 5 is invariably the States' sovereign and fiscal loss. Political-process federalism is a two-way street. If the States are expected to protect their sovereign interests in the Halls of Congress, they have every right to know when the National Government believes they have failed to respect the constitutional rights of their citizens. This approach also avoids unnecessary snipe hunts through the legislative history in search of predicate instances of unconstitutional conduct that Congress never searched for in the first instance and that it helps no one suddenly to improvise. Most of all, however, this approach supports the core goal that it is the business of section 5 to advance — to root out and end Fourteenth Amendment violations. Nothing about a *sotto voce* exercise of this remedial authority serves that essential end.

## 2. The ADEA Does Not Respond To A "Predicate" Pattern, Or Even A Single Threat, Of Unconstitutional State Action.

"[P]roper prophylactic section 5 legislation" also must fairly anticipate or "respond to a history of 'widespread and persisting deprivation of constitutional rights.'" *Florida Prepaid*, 119 S. Ct. at 2210 (quoting *City of Boerne*, 521 U.S. at 526). The ADEA, however, does no such thing. Whether one considers *prior* equal protection violations or potential *future* ones, the congressional record is conspicuously silent in either direction.

**No pattern of prior State violations exists.** A brief review of the text and legislative record of the ADEA confirms that it

does not even pretend to "respond" to State action, to say nothing of unconstitutional State action, but instead turns entirely on Article I policy concerns. One searches in vain for even a murmur of the "predicate unconstitutional conduct that Congress intended to remedy" by extending the ADEA to the States in 1974. *Florida Prepaid*, 119 S. Ct. at 2210.

Far from reflecting State insensitivity to the equal protection rights of their citizens, the legislative record of the ADEA "acknowledg[es] that 'states are willing and able to respect [the employment] rights'" of the elderly. *Florida Prepaid*, 119 S. Ct. at 2207. Indeed, Congress first looked to State age-discrimination statutes as guidance for enacting the ADEA in 1967. "As part of the preparation for" its 1965 report on age discrimination, "a conference of State administrators of age discrimination laws was convened by the Secretary of Labor, in September 1964, to see their views on the effectiveness of such legislation." See Report of the Secretary of Labor, *The Older American Worker: Age Discrimination in Employment*, 9-10 (1965), reprinted in Equal Employment Opportunity Comm. (EEOC), *Legislative History of the Age Discrimination in Employment Act*, 16-41 (1981), (hereinafter "*Older American Worker*"). During debates over the law, the legislature repeatedly applauded the success of State age-discrimination laws:

\* "I am confident that just as the 14 States have found ways to adequately enforce their State laws barring discrimination in hiring practices because of age, so can the Department of Labor set up adequate procedures under the title." 110 Cong. Rec. 2598 (1964) (statement of Rep. Pucinski); see *id.* at 2597;

\* The 1965 report by the Secretary of Labor acknowledged that "[a]rbitrary age discrimination is significantly reduced in States which have strong laws, actively administered, directed against discrimination based on age." *Older American Worker*, at 9;



\* "The Secretary's report set forth the scope and complexity of the problem, concluded that it can be solved, and cited the success of State laws against age discrimination in employment." 112 Cong. Rec. 20821 (1966);

\* "20 States and Puerto Rico already have laws on the books prohibiting discrimination in employment because of age. I am informed that these laws have been extremely successful in broadening job opportunities for older workers." 112 Cong. Rec. 20820 (1966);

\* "State experience with statutes prohibiting discrimination in employment on the basis of age indicates that such practice can be reduced by a well-administered and well-enforced statute, coupled with an educational program." S. Rep. No. 89-1487, at 47 (1966) (joint statement of Senators Javits, Prouty, Murphy and Griffin);

\* "There are now 24 States which have age discrimination legislation of the type proposed" in the federal legislation, and "[t]he overall reaction to the laws is favorable." H.R. Rep. No. 90-805, at 2 (1967); S. Rep. No. 90-723, at 2 (1967) (same).

Not surprisingly, when it came to extending the ADEA to the States in 1974, Congress did not suddenly begin criticizing the States' treatment of their elderly citizens. Instead, the legislature continued to acknowledge the growing number of States that banned age discrimination. See Senate Special Comm. on Aging, *Improving the Age Discrimination Act: A Working Paper*, 93d Cong., 1st Sess. 37 (1973) (statement of Secretary of Labor Willard Wirtz) (noting "26 States and Puerto Rico which have laws relating to age discrimination"); 118 Cong. Rec. 24397 (1972) ("some 31 States have some form of age discrimination law") (statement of Sen. Bentsen); see Appendix. Congress also "found that strong State laws, when actively administered, reduce arbitrary discrimination against middle-aged and older people, enabling them to be considered more frequently for vacant positions." Senate

Special Comm. on Aging, *Improving the Age Discrimination Act: A Working Paper*, 93d Cong., 1st Sess. 9 (1973).

Aside from looking to the States for guidance regarding initial passage of the ADEA and aside from complimenting the State age-discrimination provisions, the decision to extend the ADEA to the States in 1974 turned on little legislative discussion about State employment practices. The bulk of the 1974 amendment process instead concerned Congress's modifications to the FLSA and its extension of the FLSA to the States. Just one section of the 29-section Act, it turns out, concerned the ADEA. See Pub. L. No. 93-259; see also 120 Cong. Rec. 8762-64 (1974). And of the leading Senate and House Reports, just eight of 515 pages concerned the ADEA. See S. Rep. No. 92-842, at 45-46 (1972); S. Rep. No. 93-300, at 56-57 (1973); S. Rep. No. 93-690, at 55-56; H.R. Rep. No. 93-913, at 40-41 (1974).

To the extent that Congress gave any explanation for extending the ADEA to the States, the legislature said that it was "a logical extension of the Committee's decision to extend the FLSA coverage to Federal, State, and local government employees," S. Rep. No. 93-690, at 55 (1974); H.R. Rep. No. 93-913, at 40 (1974), or that "employees of State and local governments are entitled to the same benefits and protections in equal employment as the employees in the private sector of the economy," 118 Cong. Rec. 15895 (1972) (statement of Sen. Bentsen) (quoting Senate Report). Either way, these are self-evidently Interstate Commerce Clause, not Fourteenth Amendment, concerns. See *Florida Prepaid*, 119 S. Ct. at 2210-11 (goal of "plac[ing] States on the same footing as private parties" is a "proper Article I," not section 5, "concern[ing]").

Much of the 1974 legislative record, linked as it was to the FLSA amendments, refers to Congress's interstate commerce powers. The Senate Report, for example, said that "there is no doubt that the activities of public sector employers affect



interstate commerce and therefore that the Congress may regulate them pursuant to its power to regulate interstate commerce." S. Rep. No. 93-690, at 24. *See also id.* at 22; H.R. Rep. No. 93-913, at 2. And of course the statement of findings and purpose of the 1967 law, which was not altered in 1974, explicitly referred to interstate commerce. *See* 29 U.S.C. § 621(a)(4) ("the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce"). Nothing about the 1974 amendments suddenly and silently changed the ADEA's 1967 foundation in the Interstate Commerce Clause.

In the face of this congressional record, it is difficult to credit the United States' contention that Congress exercised "a special legislative competence" (U.S. 22) in making "empirical conclusions" (U.S. 10) regarding State violations of the constitutional rights of their citizens over the age of 40. No such record exists. Moreover, there was nothing "empirical" about this Court's legal conclusion that age discrimination in employment is generally not unconstitutional. *See, e.g., Bradley*, 440 U.S. at 108-09. The United States's suggestion that Congress could permissibly conclude otherwise (U.S. 27-29) is a thinly-veiled contention that Congress may, under section 5, expand the substantive scope of the Constitution. *City of Boerne*, however, plainly forecloses that contention. *See* 521 U.S. at 516-29.

Nor does it change matters (U.S. 29-39; Pet. 28-36) that the ADEA findings say that the law will "prohibit arbitrary age discrimination in employment," 29 U.S.C. § 621(b), or that the legislative record contains several references to "arbitrary" discrimination against the elderly. Not one of the references to "arbitrary" employment practices refers to State governments or for that matter even to the Federal government. They all refer to private employment practices or to employment practices generally. Nor, to the extent the

legislature meant to use the term in its constitutional sense, could Congress credibly have made any such finding. Whether one looks to the United States Reports or the Federal Reporter in 1967, 1974, even today, no such violations have been shown.

Just as importantly, this is "purely a semantical dispute." *Griffin v. United States*, 502 U.S. 46, 58-59 (1991). It is one thing to show that employment practices violate the arbitrariness minimums of the Constitution; it is quite another to say that certain practices are arbitrary as a matter of policy. "The answer to petitioner's objection is simply that [Congress was] using [arbitrary] in the latter sense." *Id.* at 59. The context of each remark illustrates the point. Most of the references to arbitrary practices, including all of those in the text of the ADEA, stem from the 1967 legislation, when Congress could not possibly have been referring to unconstitutional conduct, as the law applied only to private employers. During the 1967 legislative debate, one Senator went so far as to say that "age discrimination is not prohibited in the Constitution," S. Rep. No. 90-723, at 15 (statement of Sen. Dominick), while during the 1974 debate another Senator said that "[t]he passage of this measure insures that Government employees will be subject to the same protections against arbitrary employment based on age as are employees in the private sector," 120 Cong. Rec. 8768 (1974) (statement of Sen. Bentsen). Petitioners' references to the term "arbitrary" in the legislative record all illustrate the policy-driven, not constitutional, nature of this usage.

Also unavailing is petitioners' reliance (U.S. 29-39; Pet. 30-32) on sporadic references in the legislative record to alleged governmental discrimination against the elderly. None of the references concerns unconstitutional conduct. Most of the references relate to discrimination by the Federal government, *see, e.g.,* 118 Cong. Rec. 7745 (1972); S. Rep. No. 93-846 (1974), including a special report on the issue labeled

*Cancelled Careers: The Impact of Reduction-in-Force Policies on Middle-Aged Federal Employees*, Senate Special Comm. on Aging, 92d Cong., 2d Sess (1972). See also Senate Special Comm. on Aging, *Improving the Age Discrimination Law*, 93d Cong., 1st Sess. (Comm. Print 1973). And the few references to State government do not even have rhetorical value, to say nothing of section 5 value. In a floor speech in 1972, Senator Bentsen suggests that there is "mounting evidence that employees of Federal, State and local governments" face discrimination. 118 Cong. Rec. 7745 (1972). But the only evidence he mentions regarding the States, "mounting" or otherwise, is that "[l]etters from my own State have revealed that State and local governments have also been guilty of discrimination toward older employees." *Id.* That is it. Not only are these "fleeting references" (*Florida Prepaid*, 119 S. Ct. at 2209) few and far between, but because Senator Bentsen did not place the letters in the record, they do not even clarify whether the identified conduct violates equal protection.

Later congressional debates over the ADEA make matters worse. Instead of identifying studies demonstrating the remedial nature of the ADEA, subsequent changes confirm the substantive, non-remedial scope of the law. In 1978, the legislature extended the protected class of employees from 40-65 to 40-70 and made it more difficult for State and private employers to maintain mandatory age guidelines. The change, however, plainly did not respond to unconstitutional State action, but to a decision of this Court.

The House Committee on Aging in particular was critical of the Court's 1976 *Murgia* decision. It observed that while the decision "does not close the door completely to successful constitutional attacks on mandatory retirement in the courts . . . the likelihood of success is very bleak." House Select Comm. on Aging, 95th Cong., 1st Sess., *Mandatory Retirement: The Social and Human Cost of Enforced Idleness* 38 (Comm. Print

1977). The Committee then disagreed with *Murgia*'s decision not to elevate age to a suspect class, noting that "[f]rom the evidence presented, the committee concludes that 'age' should be as protected a classification as race and sex." *Id.* Leaving no doubt about the target of the 1978 amendment, the discussion ended with the coda: "If mandatory retirement because of age — the final step in the practice of age discrimination — is not to be declared unconstitutional by the Courts, then Congress should act to make such a practice illegal." *Id.* While such sentiments may support Interstate Commerce Clause legislation, they do not reflect the "specially informed legislative competence" that section 5 entrusts to Congress, *Katzenbach v. Morgan*, 384 U.S. 641, 656 (1966) (emphasis added), and utterly disrespect the inter-branch imperative that "it is this Court's precedent," not Congress's view of that precedent, "which must control." *City of Boerne*, 521 U.S. at 536. "Congress does not enforce a constitutional right by changing what the right is." *Id.* at 519.

**No threat of future violations exists.** Nor does the future look any more threatening than the past. To our knowledge, Congress nowhere expressed any such concern, whether in the text of the law or in the legislative record. Nor can any such threat be contrived today, as the United States goes a long way to admitting when it acknowledges (U.S. 43) that the "States have largely abolished mandatory retirement ages and other across-the-board uses of age in most employment matters."

Besides being governed by democratically-elected officials sworn to uphold the Constitution of the United States, States all have laws or administrative provisions restricting age discrimination. See Appendix. These provisions go beyond what the Constitution requires, they each apply generally to public employees, and they each permit monetary relief. See Appendix. It may be that a fertile legal mind can still posit an instance of State conduct that violates equal protection — because it "is so unrelated to the achievement of any



combination of legitimate purposes," *Bradley*, 440 U.S. at 97 — but that does not violate State law. Such hypothetical risks, however, cannot possibly constitute the kind of "threat" that triggers Congress's "prophylactic" section 5 power.

Still less is that possible when one considers not just the remedies provided by the 50 State laws but the whole panoply of remedial options that an allegedly beleaguered State employee would have. Today, only the most exceptional alignment of misfortune would allow a constitutional violation to go unremedied: (1) The State or Federal lower courts would have to deny relief on equal protection grounds; (2) this Court would have to deny relief on equal protection grounds; (3) the State courts would have to deny relief under their own Constitution; (4) the States would have to deny judicial or administrative relief under State law; (5) the States would have to decline to waive immunity to ADEA claims in State court; (6) the federal courts would have to deny *Ex Parte Young* relief under ADEA in federal court; (7) the Federal Government would have to choose not to sue the State under ADEA for money damages in federal court; and (8) the "Constitution[']s presum[ption] that . . . even improvident decisions will eventually be rectified by the democratic process," *Bradley*, 440 U.S. at 97, would have to fail. No doubt, anything may happen. But if it did under this sequence of events, State recalcitrance to the dictates of the Constitution would hardly be the reason.

All things considered, in "enacting the [ADEA amendments], Congress identified no pattern of [age discrimination] by the States, let alone a pattern of constitutional violations." *Florida Prepaid*, 119 S. Ct. at 2207. Whether one looks backward in time or forward, in neither direction is there a pattern, practice, even an isolated threat, of unconstitutional State action against the elderly. Congress in the end did not unearth a single shard of State misconduct. The only real evidence is of States over-protecting the constitutional rights

of the elderly, not undermining them. The legislative record, as in *Florida Prepaid* and *City of Boerne*, "contains no evidence that unremedied [age discrimination] by States had become a problem of national import." *Florida Prepaid*, 119 S. Ct. at 2207-08. The predicate of prophylactic section 5 legislation in short is missing, and for this reason alone ADEA's extra-constitutional requirements exceed Congress's Fourteenth Amendment authority.

### 3. The ADEA Independently Fails The Proportionality Requirements Of Section 5.

Even if the condition of State misconduct could somehow be established, the ADEA would still exceed congressional power. The law is "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *City of Boerne*, 521 U.S. at 532.

The ADEA's application to the States carries one hallmark after another of unvarnished policy-based legislation, as opposed to calibrated remedial legislation. For starters, the law applies in equal measure to State and private employers, 29 U.S.C. § 630(b), even though the Fourteenth Amendment covers the former but not the latter. Above and beyond their separate oath to obey the Constitution, public employers accountable to the ballot box (including many voters over the age of 40) operate under different economic and social pressures from private employers accountable to dividend-anxious shareholders. It blinks at reality to assume that the employment risks in the one setting apply equally to the other, as Congress presumably realized in making the ADEA applicable only to private employers in 1967. Paradoxically, however, federal mandatory retirement guidelines have not always applied similarly to State and local mandatory retirement guidelines under the ADEA, even though equal protection *does* cover both sets of workers. See *Johnson v. Mayor & City of Baltimore*, 472 U.S. 353 (1985) (Federal law



requiring federal firefighters to retire at age 55 did not establish that comparable provision for city firefighters complied with the ADEA).

As with the Patent Remedy Act, the law also is of "indefinite" duration. *Florida Prepaid*, 119 S. Ct. at 2210. Unlike the voting rights measures previously approved by the Court, the ADEA does not require the legislature to assess in a remedial manner the progress States are making in curing or ending allegedly unconstitutional practices, *City of Boerne*, 521 U.S. at 532-33. The law also "expansive[ly]" covers every form of government employment and applies to virtually every government worker over the age of 40, as opposed "to limit[ing] the coverage of the Act to cases involving arguable constitutional violations." *Florida Prepaid*, 119 S. Ct. at 2210. Even AARP, a most vigilant protector of the rights of the elderly and an *amicus curiae* in this case, does not offer benefits to individuals until age 50.

Above all else, however, "it simply cannot be said that 'many of [the State employment actions] affected by the congressional enactment have a significant likelihood of being unconstitutional.'" *Florida Prepaid*, 119 S. Ct. at 2210 (quoting *City of Boerne*, 521 U.S. at 532). The rigorous standard of review applicable to an ADEA action has no parallel to the forgiving standard that the Court applies to equal protection claims.

Take the review applicable to mandatory retirement laws. Under the Equal Protection Clause, *Gregory* teaches that such laws may rest on the "generalization" that "physical and mental capacity sometimes diminish with age," 501 U.S. at 472, that such laws must be upheld even when the generalization "may not be true at all," *id.* at 473, and that such laws will be upheld so long as the claimant is unable to establish that the "facts on which the classification is apparently based could not reasonably be conceived to be true by the . . . decisionmaker," *id.* (quoting *Bradley*, 440 U.S. at

111). The ADEA, however, specifically outlaws such generalizations, "requir[ing] the State to achieve its goals in a more *individualized* and careful manner than would otherwise be the case." *EEOC v. Wyoming*, 460 U.S. at 239 (emphasis added). The very fact that Wyoming's age-55 retirement law for its Game and Fish Department continued under the ADEA to be litigated in *EEOC v. Wyoming*, some 7 years after the Court upheld a similar guideline in *Murgia*, is evidence enough that the two standards of care are disproportionate. See *EEOC v. Wyoming*, 460 U.S. at 260-61 (Burger, C.J., dissenting) ("Were we asked to review the constitutionality of [this law], we would reach a result consistent with *Bradley* and *Murgia*."). Any lingering doubt on this score is removed by the 1978 ADEA amendments, which in the aftermath of *Murgia* tried to make it "quite clear that the policies and substantive provisions of the Act apply with especial force in the case of mandatory retirement provisions." *Western Air Lines, Inc. v. Criswell*, 472 U.S. at 410. See also House Select Comm. on Aging, 95th Cong., 1st Sess., *Mandatory Retirement: The Social and Human Cost of Enforced Idleness* 38 (1977) ("Congress should act to make such a practice illegal" when the Court will not).

Consider next the different defenses available to States in Fourteenth Amendment and ADEA claims. Constitutional claims withstand scrutiny unless the basis for the varying treatment "could not reasonably be conceived to be true by the . . . decisionmaker," *Gregory*, 501 U.S. at 473 (quoting *Bradley*, 440 U.S. at 111), which frequently is "tantamount to an instruction to return a verdict in the defendant's favor," *Criswell*, 472 U.S. at 421. Under the ADEA, however, differential treatment is only permitted "where age is a bona fide occupational qualification [BFOQ] *reasonably necessary* to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1) (emphasis added). The BFOQ defense is "one of 'reasonable necessity,' not reasonableness,"

*Criswell*, 472 U.S. at 419, and represents “an extremely narrow exception to the general prohibition’ of age discrimination contained in the ADEA.” *Id.* at 412 (quoting *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977)).

ADEA litigation thus contrasts with rational-basis litigation at every turn: (1) The ADEA requires individual “case-by-case” determinations, 472 U.S. at 411 (quoting H.R. Rep. No. 805, 90th Cong., 1st Sess., 7 (1967)), not “generalization[s]” about a class of employees, *see Gregory*, 501 U.S. at 473; (2) it frequently places the burden of proof on the State to justify differential treatment, *see Criswell*, 472 U.S. at 416 n. 24 (citing 46 Fed. Reg. 47727 (1981), 29 C.F.R. § 1625.6(b) (1984)), not the claimant, *Murgia*, 427 U.S. at 314; (3) it requires an “objective justification in a court of law,” 472 U.S. at 419, not a justification that could “reasonably be conceived to be true,” *Bradley*, 440 U.S. at 111, and that “[i]t is not within the competency of the courts to arbitrate,” *id.* at 112 (quotation omitted); (4) it requires in the context of public safety justifications “that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact,” *Criswell*, 472 U.S. at 416 n.24 (quoting 29 C.F.R. § 1625.6(b)), not the recognition that the State need not choose the “best means to accomplish this purpose,” *Murgia*, 427 U.S. at 316; and (5) it permits mandatory age laws for State law enforcement at age 55, 29 U.S.C. § 623(j)(1)(B), not at age 50, *see Murgia*, 427 U.S. at 308. What is more, with the EEOC’s blessing, 29 C.F.R. 1625.7(d), the ADEA has been used in these actions and others to bring disparate-impact claims against the States, which the United States does not defend as a proportionate exercise of section 5 power and which petitioners only faintheartedly (Pet. 33 n. 20, 43-44 & n.26) defend. As these outcome-dispositive distinctions make clear, the ADEA has no more connection to the requirements of the Fourteenth Amendment than RFRA did in *City of Boerne* or than the Patent Remedy Act did in *Florida Prepaid*.

What the ADEA does have compelling parallels to is the standard of review applicable to race, gender, religion, and ethnicity discrimination. The language of the ADEA, it turns out, is not the language of rational-basis review, but the language of Title VII. The substantive provisions of the two laws are virtually identical. *Compare* 29 U.S.C. § 623(a)(1) (“to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age”) *with* 42 U.S.C. § 2000e-2(a)(1) (“to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin”). And the substantive defenses are identical as well. *Compare* 29 U.S.C. § 623(f)(1) (“reasonably necessary to the normal operation of the particular business”) *with* 42 U.S.C. § 2000e-2(e) (same).

An identical burden-shifting framework also applies to each claim. Even when no direct evidence of age discrimination exists, as in a Title VII case, the burden of proof still shifts to the employer under ADEA if the plaintiff can show (1) that he belongs to the protected group, (2) he is qualified for the position, (3) he was rejected, and (4) after his rejection, the position remained open and the employer continued to seek applications from persons of plaintiff’s qualifications. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). At that point, the burden then shifts to the employer to articulate a legitimate nondiscriminatory reason for its decision. *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25 (1978) (per curiam). The existence of a rational basis for the employer’s decision has no place in the analysis. Instead, in the context of public safety justifications, the State must show “that there is no acceptable alternative which would better advance it or equally advance



it with less discriminatory impact," *Criswell*, 472 U.S. at 416 n.24 (quoting 29 C.F.R. § 1625.6(b)). Compare *Murgia*, 427 U.S. at 316 (State need not choose the "best means to accomplish" its "purpose").

Congress ultimately placed age-based classifications, which are presumptively constitutional, on a par with race-based classifications, which presumptively are not. As in *City of Boerne*, the ADEA simply replaces one level of judicial scrutiny with another, and does so out of all proportion to any real or threatened constitutional wrongs. For this independent reason, the law exceeds Congress's section 5 authority.

**D. The Conclusion That The ADEA Exceeds Congressional Power Fits Well Within The Court's Section 5 Holdings, And Preserves Vital Principles Of Federalism.**

Not just the language of this Court's section 5 precedents, but the holdings as well, establish that the ADEA does not constitute proper enforcement legislation. Even with respect to the central evils addressed by the Civil War Amendments — race and voting — the Court has long required congressional authority to be linked to actual or empirically-threatened violations of the underlying amendment. Common sense and logic ought to suffice to reject the paradoxical exercise of a prophylactic power in an unprophylactic setting. But if not, precedent does. No holding of the Court supports the exercise of prophylactic authority under section 5 in the context of rights that warrant only rational-basis review.

Nearly 30 years ago, in *Oregon v. Mitchell*, 400 U.S. 112 (1970), the Court confirmed that Congress does not have "a substantive, non-remedial power under the Fourteenth Amendment," *City of Boerne*, 521 U.S. at 527, and did so in the context of a non-suspect age-based preference. A majority of the court concluded that Congress exceeded its section 5 authority in passing legislation designed to protect the young

by lowering the minimum age of voters from 21 to 18 in State and local elections. See 400 U.S. at 125 (opinion of Black, J.); *id.* at 154, 209 (opinion of Harlan, J.); *id.* at 294, 296 (opinion of Stewart, J., joined by Burger, C.J., and Blackmun, J.). Contrary to the United States' suggestion (U.S. 21), the Court has not upheld prophylactic section 5 legislation designed to "prohibit classifications that were subject merely to rational basis scrutiny." Rather, *Fitzpatrick v. Bitzer*, 427 U.S. 445, addressed only whether section 5 legislation could abrogate Eleventh Amendment immunity, as the State did not otherwise argue that the "substantive provisions of Title VII as applied here are not a proper exercise of congressional authority under § 5 of the Fourteenth Amendment," *id.* at 456 n.11. And *Maher v. Gagne*, 448 U.S. 122 (1980), did not involve an effort to place extra-constitutional requirements on the States at all but only the question whether attorney fees could be permitted in cases involving Fourteenth Amendment claims. Nor does it follow that Congress is "disable[d]" (U.S. 23) from acting in a rational-basis setting. The context just makes it far more difficult to enact prophylactic laws, as opposed to laws that merely vindicate constitutional violations.

Even in the context of fundamental rights, *City of Boerne*, *Florida Prepaid*, and *College Savings* all invalidated legislation that did not respond to a record of constitutional violations and that was disproportionate to any alleged harm. While the defenders of RFRA, as here and as in *Florida Prepaid* and *College Savings*, argued that it was "a reasonable means of protecting the free exercise of religion," and was designed "[t]o avoid the difficulty of proving such violations," *City of Boerne*, 521 U.S. at 529, the Court nonetheless concluded that the law exceeded congressional power. The decision in the *Civil Rights Cases*, 109 U.S. 3 (1883), is to the same effect, noting that section 5 "cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication.



That would be . . . to make Congress take the place of the State Legislatures and to supersede them." *Id.* at 13.

The Court's voting rights decisions all point in the same direction. They each involved patterns and practices of unconstitutional State action, and therefore properly allowed Congress to impose calibrated extra-constitutional requirements on the States. *See, e.g., South Carolina v. Katzenbach*, 383 U.S. at 309 (law was enacted in response to "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution" and that prior remedies had been "unsuccessful"); *Katzenbach v. Morgan*, 384 U.S. at 653-54 (literacy test ban "was merely legislation aimed at the elimination of an invidious discrimination in establishing voter qualifications"); *Ex Parte Virginia*, 100 U.S. 339 (permitting civil rights legislation applied to a State trial court judge who excluded jurors on account of race); *Oregon v. Mitchell*, 400 U.S. at 131-34 (literacy tests) (Black, J., writing for Court) (noting "long history" of discriminatory use of literacy tests); *id.* at 216-17 (Harlan, J., concurring) (sufficient evidence of racial discrimination with literacy tests); *id.* at 282-84 (Stewart, J., concurring, joined by Blackmun, J. and Burger, C.J.) ("nationwide application may be reasonably thought appropriate when Congress acts against an evil such as racial discrimination which in varying degrees manifests itself in every part of the country"); *City of Rome v. United States*, 446 U.S. 156 (1980) (same).

In contrast, a decision upholding the prophylactic exercise of section 5 power in the context of rational-basis scrutiny, with no underlying constitutional violations to boot, would break new ground and do little "to allay lingering concerns about the extent of the national power." *Alden v. Maine*, 119 S. Ct. 2240, 2247 (1999). Such authority simply has no stopping point. Virtually any federal law that is itself rational could fairly be said to curb the risk of irrational State

lawmaking in the area. With respect to the "life, liberty or property" guarded by procedural due process, only self-restraint would stand in the way of the national government legislating a more appropriate "process" for State governments to follow. *Civil Rights Cases*, 109 U.S. at 13.

As for other rights incorporated through the due process clause, the risks may be even greater. What would prevent Congress from passing legislation regulating all encounters between State law enforcement and the citizenry in the name of protecting Fourth and Fifth Amendment rights? What would prevent property rights advocates from expanding this Court's "regulatory takings" case law, *see Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978)? What would prevent federal laws nationalizing a system of punishments in the name of protecting Eighth Amendment rights? And what would prevent the federalization of education, marriage and family laws in the name of protecting privacy and other substantive due process guarantees? Indeed, under this expansive theory, it is not clear how *City of Boerne*, *Florida Prepaid*, *College Savings* and *Oregon* would still be good law or why the Court's landmark decisions in *Lopez v. United States*, *Seminole Tribe v. Florida*, *New York v. United States* and *Alden v. Maine* would not be a prophylactic step from irrelevance. The invitation to start down this precipitous path should be rejected.

**CONCLUSION**

For the foregoing reasons, the States of Florida and Alabama respectfully urge the Court to hold that the ADEA does not permissibly abrogate their immunity from suit.

Respectfully submitted,

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**APPENDIX**



**STATE AGE DISCRIMINATION LAWS**

	<b>ALABAMA</b>	<b>ALASKA</b>
Applicable to Public Employers	YES Ala. Admin. Code r. 670-X-4-.01,* Ala. Code § 25-1-20, et seq.**	YES Alaska Stat. § 18.80.300(4)
Applicable to Public Employers Before 1974	NO	NO
Monetary & Equitable Relief	YES r. 670-x-4-.03	YES § 18.80.110 § 18.80.130
Punitive Damages	Not determined	NO 836 P.2d (Alaska 1991)
Attorney Fees	Not determined	YES § 18.80.130(2)(e)
Agency Enforcement	YES r. 670-x-4-.01	YES § 18.80.060
Forbids Unlawful Practices Specified in ADEA	YES r. 670-x-4-.01	YES § 18.80.220, § 18.80.260

\* Not applicable to university employees; the University of Montevallo Grievance Procedure covers age discrimination.

\*\* The Alabama Supreme Court has not yet determined whether it applies to public employees.

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	ARIZONA	ARKANSAS
Applicable to Public Employers	YES Ariz. Rev. Stat. Ann. § 41-1461(6)	YES Ark. Code. Ann. § 21-3-201
Applicable to Public Employers Before 1974	NO	NO
Monetary & Equitable Relief	YES § 41-1481(G)	YES § 21-9-203(a)
Punitive Damages	Not determined	Not determined
Attorney Fees	YES § 41-1481(J)	Not determined
Agency Enforcement	YES § 41-1402	NO
Forbids Unlawful Practices Specified in ADEA	YES § 41-1463 § 41-1464	YES § 21-3-203

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	CALIFORNIA	COLORADO
Applicable to Public Employers	YES Cal. Government Code § 12926(d)	YES Colo. Rev. Stat. Ann. § 24-34-401(3)
Applicable to Public Employers Before 1974	YES Cal. Labor Code § 1420.1 et seq.	NO
Monetary & Equitable Relief	YES § 12970	YES § 24-34-306 § 24-34-405
Punitive Damages	Not determined	Not determined
Attorney Fees	YES § 12965(b)	NO 38 Colo. App. 286 (Colo. Ct. App. 1976)
Agency Enforcement	YES § 12935	YES § 24-34-305
Forbids Unlawful Practices Specified in ADEA	YES § 12941 66 Cal. Rptr.2d 888 (Cal. 1997)	YES § 24-34-402 906 P.2d 66 (Colo. 1995)

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	CONNECTI- CUT	DELAWARE
Applicable to Public Employers	YES Conn. Gen. Stat. Ann. § 46a-51(10)	YES Del. Code Ann. title 19 § 710(3)
Applicable to Public Employers Before 1974	YES Conn. Gen. Stat. § 46a-51 et seq. (renumbered from § 31-122 et seq.)	YES Del. Code Ann. title 19 § 710 et seq.
Monetary & Equitable Relief	YES § 46a-86 § 46a-90	YES § 712
Punitive Damages	NO 201 Conn. 350 (Conn. 1986)	Not determined
Attorney Fees	Not determined	YES § 712(j)
Agency Enforcement	YES § 46a-54	YES § 712
Forbids Unlawful Practices Specified in ADEA	YES § 46a-60	YES § 711 § 718

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	FLORIDA	GEORGIA
Applicable to Public Employers	YES Fla. Stat. Ann. § 760.02(6) § 112.044(2)(a)	YES Ga. Code. Ann. § 45-19-22(5)
Applicable to Public Employers Before 1974	YES § 112.044	NO
Monetary & Equitable Relief	YES § 760.11	YES § 45-19-38
Punitive Damages	YES § 760.11 * not against State	NO § 45-19-38(d)
Attorney Fees	YES § 760.11	YES § 45-19-38(c) 211 Ga. App. 134 (Ga. Ct. App. 1993)
Agency Enforcement	YES § 760.06	YES § 45-19-27
Forbids Unlawful Practices Specified in ADEA	YES § 760.10	YES § 45-19-29 § 45-19-30 § 45-19-31 § 45-19-44



6a

	HAWAII	IDAHO
Applicable to Public Employers	YES Haw. Rev. Stat. Ann § 378-1	YES Idaho Code § 67-5902(6)(b)
Applicable to Public Employers Before 1974	NO	NO
Monetary & Equitable Relief	YES § 378-5	YES § 67-5908
Punitive Damages	YES § 368-17(a)	YES § 67-5908(3)(e)
Attorney Fees	YES § 378-5	NO 129 Idaho 234 (Idaho Ct. App. 1996)
Agency Enforcement	YES § 368-3	YES § 67-5906
Forbids Unlawful Practices Specified in ADEA	YES § 378-2	YES § 67-5909, § 67-5911

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	ILLINOIS	INDIANA
Applicable to Public Employers	YES 775 Ill. Comp. Stat 5/1-103(L)	YES § 22-9-2-1 (but does not apply to any entity covered by the ADEA) Ind. Code. Ann. § 22-9-2-1 et seq.
Applicable to Public Employers Before 1974	YES Ill. Rev. Stat. 1975, ch. 48 §§ 881-887	YES Ind. Code. Ann. § 22-9-2-1 et seq.
Monetary & Equitable Relief	YES § 5/8A-104	YES 724 F. Supp. 599 (N.D. Ind. 1989)
Punitive Damages	Not determined	Not determined
Attorney Fees	YES § 5/8A-104(G)	Not determined
Agency Enforcement	YES § 5/7A-101	YES § 22-9-2-5
Forbids Unlawful Practices Specified in ADEA	YES § 5/2-102, § 5/6-101	YES § 22-9-2-2, § 22-9-2-8 724 F. Supp. 599 (N.D. Ind. 1989)

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	<b>IOWA</b>	<b>KANSAS</b>
Applicable to Public Employers	YES Iowa Code Ann. § 216.2(7)	YES Kan. Stat. Ann. § 44-1112(d).
Applicable to Public Employers Before 1974	YES Iowa Code Ann. § 216.1 et seq. (renumbered from § 105A.2 et seq.)	NO
Monetary & Equitable Relief	YES § 216.5(4) § 216.15	YES § 44-1115 § 44-1005(k)
Punitive Damages	NO 554 N.W.2d 532 (Iowa 1996)	NO 231 Kan. 763 (Kan. 1982)
Attorney Fees	YES § 216.15(8)(a)(8)	Not determined
Agency Enforcement	YES § 216.5	YES § 44-1003 et seq., § 44-1115
Forbids Unlawful Practices Specified in ADEA	YES § 216.6, § 216.11	YES § 44-1113

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	<b>KENTUCKY</b>	<b>LOUISIANA</b>
Applicable to Public Employers	YES Ky. Rev. Stat. Ann. § 344.010(1)	YES La. Rev. Stat. Ann. § 23: 311(B)
Applicable to Public Employers Before 1974	NO	NO
Monetary & Equitable Relief	YES § 344.230 § 344.450	YES § 51:2261 § 23:313
Punitive Damages	NO 625 S.W.2d 852 (Ky. 1981)	NO 709 So. 2d 277 (La. Ct. App. 1998)
Attorney Fees	YES § 344.450	YES § 23:313
Agency Enforcement	YES § 344.180	YES § 51:2231(C)
Forbids Unlawful Practices Specified in ADEA	YES § 344.040 § 344.080 § 344.280	YES § 23:312

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	MAINE	MARYLAND
Applicable to Public Employers	YES Me. Rev. Stat. Ann. title 5 § 4553(7)	YES Md. Code Ann., Labor & Employment § 49B-15(b)
Applicable to Public Employers Before 1974	YES Me. Rev. Stat. Ann. title 5 § 4551 et seq.	YES Md. Code Ann. art. 49B-1 et seq.
Monetary & Equitable Relief	YES title 5 § 4612 title 5 § 4613	YES § 49B-11
Punitive Damages	YES *not against State title 5 § 4613	NO § 49B-11(e)
Attorney Fees	YES title 5 § 4614	Not determined
Agency Enforcement	YES title 5 § 4612(4)	YES § 49B -9A
Forbids Unlawful Practices Specified in ADEA	YES title 5 § 4572	YES § 49B-16

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	MASSACHUSETTS	MICHIGAN
Applicable to Public Employers	YES Mass. Gen Laws Ann. ch. 151B § 1(5), ch. 151B § 4(1C)	YES Mich. Comp. Laws § 37.2103(g)
Applicable to Public Employers Before 1974	YES Mass. Gen. Laws ch. 151B § 1 et seq.	YES Mich. Comp. Laws § 37.2101 et seq.
Monetary & Equitable Relief	YES ch. 151B § 5	YES § 37.2605
Punitive Damages	YES (up to 3 times actual) ch. 151B § 9	Not determined
Attorney Fees	YES ch. 151B § 5	YES § 37.2605(2)(i), § 37.2802
Agency Enforcement	YES ch. 151B § 3	YES § 37.2601
Forbids Unlawful Practices Specified in ADEA	YES ch. 151B § 4	YES § 37.2202 § 37.2701 § 37.2206



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	<b>MINNESOTA</b>	<b>MISSISSIPPI</b>
Applicable to Public Employers	YES Minn. Stat. Ann. § 363.01(28)	YES Miss. Code Ann. § 25-9-149 (1992)
Applicable to Public Employers Before 1974	NO	NO
Monetary & Equitable Relief	YES § 363.071	YES § 25-9-131, § 25-9-132
Punitive Damages	YES § 363.071(2)	Not determined
Attorney Fees	YES § 363.071(7)	NO
Agency Enforcement	YES § 363.05	YES § 25-9-131
Forbids Unlawful Practices Specified in ADEA	YES § 363.03	YES § 25-9-149

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	<b>MISSOURI</b>	<b>MONTANA</b>
Applicable to Public Employers	YES Mo. Ann. Stat. § 213.010(7)	YES Mont. Code. Ann. § 49-3-201
Applicable to Public Employers Before 1974	NO	NO
Monetary & Equitable Relief	YES § 231.075 § 213.076 § 213.111	YES § 49-2-506 § 49-2-503
Punitive Damages	YES § 213.076(4) § 213.111	NO § 49-2-506(2)
Attorney Fees	YES § 213.076 § 213.111	YES § 49-2-505(7) § 49-2-509(6)
Agency Enforcement	YES § 213.030	YES § 49-2-501 et seq.
Forbids Unlawful Practices Specified in ADEA	YES § 213.055 § 213.070	YES § 49-3-201(1) §§ 49-2-301 to 303

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	NEBRASKA	NEVADA
Applicable to Public Employers	YES Neb. Rev. Stat. § 48-1002(2), § 48-1010 (1993)	YES Nev. Rev. Stat. § 613.310(5) § 281.370
Applicable to Public Employers Before 1974	NO	YES § 281.370 § 613.310
Monetary & Equitable Relief	YES § 48-1009 § 48-1007	YES § 233.170(4)(b) § 233.180 § 613.420
Punitive Damages	Not determined	NO § 233.170(6)
Attorney Fees	YES § 48-1120(6)	Not determined
Agency Enforcement	YES § 48-1007	YES § 613.405
Forbids Unlawful Practices Specified in ADEA	YES § 48-1004 503 N.W.2d 211 (Neb. 1993)	YES § 613.330 § 613.340

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	NEW HAMPSHIRE	NEW JERSEY
Applicable to Public Employers	YES N.H. Rev. Stat. Ann. § 354-A:2(VII) (1997)	YES N.J. Stat. Ann. § 10:3-1, § 10:5-5(e) § 54:14-11
Applicable to Public Employers Before 1974	YES § 354-A:1 et seq.	YES § 10:5-1 et seq. § 52:14-11
Monetary & Equitable Relief	YES § 354-A:21(II)(d) § 354-A:5(XIV) § 354-A:22(II)	YES § 10:5-17 § 10:5-13 146 N.J. 645 (1995)
Punitive Damages	Not determined	YES § 10:5-17 (treble damages) 868 F.2d 558 (N.J. 1989)
Attorney Fees	YES § 354-A:21(II)(f)	YES § 10:5-27.1
Agency Enforcement	YES § 354-A:5	YES § 10:5-6
Forbids Unlawful Practices Specified in ADEA	YES § 354-A:7 § 354-A:19	YES § 10:3-1 § 10:5-12

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	NEW MEXICO	NEW YORK
Applicable to Public Employers	YES N.M. Stat. Ann. § 28-1-2(A)	YES N.Y. Exec. Law § 290 et seq. 620 N.Y.S.2d 407 (1994)
Applicable to Public Employers Before 1974	YES § 28-1-1 et seq.	YES § 290 et seq.
Monetary & Equitable Relief	YES § 28-1-11(E) § 28-1-13(D) § 28-1-4 § 28-1-10(H)	YES § 297(4)(c) § 297(6)
Punitive Damages	NO 110 N.M. 323 (1990)	NO § 297(4)(c)(iv) 53 N.Y.2d 492 (N.Y. 1981)
Attorney Fees	YES § 28-1-11(E) § 28-1-13(D)	NO 1996 WL 808066 (N.Y. Sup. Dec. 17, 1996)
Agency Enforcement	YES § 28-1-4	YES § 295
Forbids Unlawful Practices Specified in ADEA	YES § 28-1-7	YES § 296

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	NORTH CAROLINA	NORTH DAKOTA
Applicable to Public Employers	YES N.C. Gen. Stat. § 126-16 (1999) N.C. Gen. Stat. § 143-422.1 et seq.	YES N.D. Cent. Code § 14-02.4-02(5) § 34-01-17
Applicable to Public Employers Before 1974	NO	YES § 34-01-17
Monetary & Equitable Relief	YES § 126-37	YES § 14-02.4-20
Punitive Damages	Not determined	Not determined
Attorney Fees	YES § 126-41	YES § 14-02.4-20
Agency Enforcement	YES § 126-36 § 143-422.3 § 43B-391	YES § 14.02-4-19 § 14.02-4-21
Forbids Unlawful Practices Specified in ADEA	YES § 126-16 § 126-17 § 126-36	YES § 14-02.4-02(4) § 14-02.4-03 § 14-02.4-06 § 14-02.4-18



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	OHIO	OKLAHOMA
Applicable to Public Employers	YES Ohio Rev. Code Ann. § 4112.01(A)(2)	YES Okla. Stat. Ann. title 25, 1201(5)
Applicable to Public Employers Before 1974	NO	NO
Monetary & Equitable Relief	YES § 4112.02(N); 653 F.Supp. 1184 (S.D. Ohio 1986)	YES § 1505 § 1502.1
Punitive Damages	YES § 4112.02(N) 84 Ohio St. 3d 417 (1999)	Not determined
Attorney Fees	YES § 4112.05 § 4112.14	YES § 1505 § 1506.8
Agency Enforcement	YES § 4112.04	YES § 1501
Forbids Unlawful Practices Specified in ADEA	YES § 4112.02	YES § 1302, § 1305 § 1306, § 1601

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	OREGON	PENNSYLVANIA
Applicable to Public Employers	YES Or. Rev. Stat. § 659.010(6)	YES 43 Pa. Cons. Stat. Ann. § 954(b)
Applicable to Public Employers Before 1974	YES § 659.010 et seq.	YES § 951 et seq.
Monetary & Equitable Relief	YES § 659.070 § 659.050(2) § 659.060(3) § 659.121(1)	YES § 959(f)(1) § 962(b)(3) § 959.2
Punitive Damages	NO 298 Or. 76 (1984)	YES 930 F. Supp. 194 (E.D. Pa. 1996)
Attorney Fees	YES § 659.121	YES § 959(f.1) § 962(c.2)
Agency Enforcement	YES § 659.100	YES § 957
Forbids Unlawful Practices Specified in ADEA	YES § 659.015 § 659.030	YES § 955

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	<b>RHODE ISLAND</b>	<b>SOUTH CAROLINA</b>
Applicable to Public Employers	YES R.I. Gen. Laws § 28-5-7.1, § 28-5-6(6)	YES S.C. Code Ann. § 1-13-30(d)
Applicable to Public Employers Before 1974	YES § 28-6-1 et seq. (repealed 1980)	YES § 1-13-10 et seq. (renumbered from § 1-360.21 et seq.)
Monetary & Equitable Relief	YES § 28-5-24 § 28-5-29	YES § 1-13-90(c)(16)
Punitive Damages	YES § 28-5-29.1	Not determined
Attorney Fees	YES § 28-5-24	YES 466 F. Supp. 1234 (D.S.C. 1979)
Agency Enforcement	YES § 28-5-13	YES § 1-13-70
Forbids Unlawful Practices Specified in ADEA	YES § 28-5-7	YES § 1-13-80

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	<b>SOUTH DAKOTA</b>	<b>TENNESSEE</b>
Applicable to Public Employers	YES S.D. Codified Laws § 3-6A-15	YES Tenn. Code Ann. § 4-21-102(4)
Applicable to Public Employers Before 1974	YES § 3-6A-15	NO
Monetary & Equitable Relief	YES § 3-6A-15 § 22-6-2	YES § 4-21-307 § 4-21-311(b) § 4-21-303(g) § 4-21-305
Punitive Damages	YES Violation is a criminal misdemeanor	NO 954 S.W. 2d 34 (Tenn. 1997)
Attorney Fees	Not determined	YES § 4-21-306(a)(7) § 4-21-311(b)
Agency Enforcement	Not determined	YES § 4-21-202
Forbids Unlawful Practices Specified in ADEA	YES § 3-6A-15	YES § 4-21-301 § 4-21-401 § 4-21-502

	TEXAS	UTAH
Applicable to Public Employers	YES Tex. Labor Code. Ann. § 21.002(8), § 21.126	YES Utah Code Ann. § 34A-5-102(7)(a)
Applicable to Public Employers Before 1974	YES Dep't of Labor, report submitted to Congress, <u>Age Discrimination in Employment Act of 1967</u> (1972)	NO
Monetary & Equitable Relief	YES § 21.258 § 21.2585	YES § 34A-5-107(9)
Punitive Damages	YES § 21.2585(a)(2)	Not determined
Attorney Fees	YES § 21.125 § 21.259	YES § 34A-5-107(9)
Agency Enforcement	YES § 21.003	YES § 34A-5-104
Forbids Unlawful Practices Specified in ADEA	YES § 21.051 § 21.054 § 21.055 § 21.059	YES § 34A-5-106

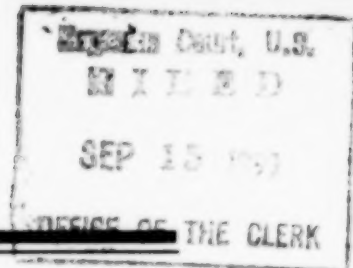
	VERMONT	VIRGINIA
Applicable to Public Employers	YES Vt. Stat. Ann. title 21 § 495d(1) (1988) title 3 § 1001	YES Va. Code Ann. § 2.1-116.06
Applicable to Public Employers Before 1974	YES title 3 § 1001	NO
Monetary & Equitable Relief	YES § 495b(b) title 9 § 2458, § 2461	YES § 2.1-116.07(B)
Punitive Damages	YES title 9 § 2461(b)	Not determined
Attorney Fees	YES § 495b(b) title 9 § 2461(b)	YES § 2.1-116.07(D)
Agency Enforcement	NO § 495b	YES § 2.1-116.14
Forbids Unlawful Practices Specified in ADEA	YES § 495	YES § 2.1-116.06



	WASHINGTON	WEST VIRGINIA
Applicable to Public Employers	YES Wash. Rev. Code § 49.60.040(1)	YES W. Va. Code § 5-11-3(d)
Applicable to Public Employers Before 1974	YES § 49.60.010 et seq.	YES § 5-11-1 et seq.
Monetary & Equitable Relief	YES § 49.60.250 129 Wash. 2d 572 (1996)	YES § 5-11-10 § 5-11-13 174 W. Va. 711 (1985)
Punitive Damages	NO 129 Wash. 2d 572 (1996)	Not determined
Attorneys Fees	YES § 49.60.250(9)	YES § 5-11-13(c)
Agency Enforcement	YES § 49.60.120	YES § 5-11-8
Forbids Unlawful Practices Specified in ADEA	YES § 49.44.090 § 49.60.180 § 49.60.210	YES § 5-11-9

	WISCONSIN	WYOMING
Applicable to Public Employers	YES Wis. Stat. Ann. § 111.32(6)(a)	YES Wyo. Stat. Ann. § 27-9-102(b)
Applicable to Public Employers Before 1974	NO	NO
Monetary & Equitable Relief	YES § 111.39(c)	YES § 27-9-106(g)
Punitive Damages	Not determined	Not determined
Attorney Fees	YES 643 F.2d 445 (7th Cir. 1981)	Not determined
Agency Enforcement	YES § 111.39	YES § 27-9-104
Forbids Unlawful Practices Specified in ADEA	YES § 111.321 § 111.322	YES § 27-9-105

(13) (12)  
Nos. 98-796 and 98-791



# In the Supreme Court of the United States

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UNITED STATES OF AMERICA, PETITIONER

*v.*

FLORIDA BOARD OF REGENTS, ET AL.

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J. DANIEL KIMEL, JR., ET AL., PETITIONERS

*v.*

FLORIDA BOARD OF REGENTS, ET AL.

---

ON WRITS OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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**REPLY BRIEF FOR THE UNITED STATES**

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## REPLY BRIEF FOR THE UNITED STATES

**A. Congress Expressed Its Clear Intent To Abrogate  
The States' Eleventh Amendment Immunity**

When Congress in 1974 extended to state employees the protections of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.*, Congress also expressed its clear intent to abrogate the States' immunity to suits under both the ADEA and the wage and hour provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.* Congress did so, *inter alia*, by amending the FLSA to authorize employees to file suit "against any employer (*including a public agency*) in any Federal or State court of competent jurisdiction," 29 U.S.C. 216(b) (emphasis added), and by expressly incorporating that provision into the ADEA, 29 U.S.C. 626(b).

Respondents acknowledge (Br. 17) that Congress inserted that language into the FLSA for the express purpose of



abrogating state immunity (see also *Alden v. Maine*, 119 S. Ct. 2240, 2261 (1999)), and that Congress did so in response to the holding in *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare*, 411 U.S. 279 (1973), that the prior version of the statute did not contain a sufficiently clear statement of intent to abrogate. Respondents offer several arguments for refusing to give effect to that abrogation under the ADEA, but none can withstand analysis.

Respondents protest first (Br. 17) that the incorporation of the FLSA's enforcement provision entails too much "page turning through the United States Code." In fact, Section 626(b) requires only one turn of the page to Section 216(b)'s explicit abrogation provision. The other incorporated "powers, remedies, and procedures" for which respondents find the page turning too arduous have no bearing on the States' liability to private suits in federal court. In any event, the clear-statement rule is a rule of clarity, not ease of reference. As long as Congress's intent is plain, the number of steps in the statutory path is irrelevant.<sup>1</sup>

Respondents (Br. 17-18) and their amicus (Pa. Repub. Caucus 4) next contend that the ADEA should not be read to incorporate Section 216(b)'s enforcement provision because it would be redundant, overlapping with the cause of action created in Section 626(c). But they are mistaken for four

<sup>1</sup> Amici Ohio, *et al.* (Ohio) argue (Br. 11) that a provision of law incorporated into another statute is merely a "coy hint" rather than a clear statement. But it is "well-settled" that a provision adopted by reference "is the same as [if] the statute or provisions adopted had been incorporated bodily into the adopting statute." *Hassett v. Welch*, 303 U.S. 303, 314 (1938) (citation omitted); see also *Panama R.R. v. Johnson*, 264 U.S. 375, 391-392 (1924) ("Criticism is made of the statute because it does not set forth the new rules but merely adopts them by a generic reference. But the criticism is without merit. \* \* \* This is a recognized mode of incorporating one statute or system of statutes into another, and serves to bring into the latter all that is fairly covered by the reference."); Gov't Br. 15 n.15.

reasons. First, Congress's language could not be plainer: all of Section 216's "powers, remedies, and procedures" are incorporated except those in "subsection (a) thereof." 29 U.S.C. 626(b). Second, this Court has already recognized that Section 216(b)'s cause of action against public agencies is incorporated into the ADEA. See Gov't Br. 15 n.15 (citing cases). Third, the two provisions are not redundant. Section 216(b) authorizes actions for unpaid wages and overtime compensation. Section 626(c) broadly authorizes all "legal or equitable relief." Together, the two provisions ensure full relief for victims of age discrimination. Fourth, the existence of two overlapping jurisdictional provisions applicable to the States underscores, rather than obscures, Congress's intent to abrogate.

Respondents (Br. 18) and Ohio (Br. 11-12) also argue that Section 216(b)'s enforcement provision can only waive the States' immunity from liability for violations of the FLSA's minimum wage and hour provisions, and not for violations of the ADEA, because the Section 216(b) cause of action only applies to "[a]n action to recover the liability prescribed in either of the preceding sentences." But Congress expressly extended Section 216(b)'s coverage to ADEA violations by "deem[ing]" "[a]mounts owing to a person as a result of a violation" of the ADEA "to be unpaid minimum wages or unpaid overtime compensation for purposes of section[] 216," and by "deem[ing]" any "act prohibited under section 623 of [the ADEA] \* \* \* to be a prohibited act under Section 215" of the FLSA. 29 U.S.C. 626(b) (emphases added).

Finally, respondents suggest (Br. 16-17) that the statutory language authorizing suit in any "court of competent jurisdiction," 29 U.S.C. 626(b) and (c), is ambiguous because it is susceptible to the interpretation that, where the State is immune, federal courts are not competent to hear the suit. But that argument has no merit in the context of the 1974 amendments to the FLSA and ADEA, where the particular suits authorized in courts of competent jurisdiction are suits

by public employees against their public employers, and where the undisputed purpose of the language was to overcome the holding of *Employees* that the FLSA did not contain a sufficiently clear statement of intent to abrogate immunity. Moreover, even where Eleventh Amendment immunity exists, federal courts are not *incompetent* to hear private claims against the States. See *Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 389 (1998) ("The Eleventh Amendment \* \* \* does not automatically destroy original jurisdiction. \* \* \* Unless the State raises the matter, a court can ignore it.") (citations omitted).<sup>2</sup> Lastly, respondents' claim that the phrase "competent jurisdiction" limits the cause of action to state court suits (Br. 16) cannot be correct, because abrogation of immunity to suit in state courts is governed by the same clear-statement rule that applies in federal court. See *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 205-206 (1991).<sup>3</sup>

**B. Classifications Based On Age Are Proper Subjects For Section 5 Enforcement Legislation**

Respondents and their amici do not dispute that classifications based on age are subject to scrutiny under the Equal Protection Clause. Nor do they question that the Equal Protection Clause forbids States, in the conduct of governmental activities, to "rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne v.*

<sup>2</sup> See also *Schacht*, 524 U.S. at 393-394 (Kennedy, J., concurring); *United States v. Morton*, 467 U.S. 822, 828 (1984) ("The concept of a court of 'competent jurisdiction' is 'usually used to refer to subject-matter jurisdiction,' and not to personal jurisdiction over particular defendants.).

<sup>3</sup> Respondents and their amici offer no answer to the argument that, just like the Title VII provisions at issue in *Fitzpatrick v. Bitzer*, 427 U.S. 445, 449 n.2 (1976), the 1974 amendments to the ADEA placed States as employers squarely within a pre-existing enforcement scheme that specifically and expressly contemplated suits by employees against employers in federal court.

*Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985). Instead, respondents argue (Br. 44-47) that Congress's authority to enforce the Fourteenth Amendment is narrower than this Court's in that it does not extend to the enforcement of rights subject only to rational basis review by the courts. But the text of Section 5 of the Fourteenth Amendment offers no support for the proposition that Congress's power should wax and wane based on categories this Court crafted to constrain *judicial* review under the Clause nearly a century after the Fourteenth Amendment's enactment. And this Court has repeatedly emphasized that congressional power is broader, not narrower, than judicial power in this area, because it includes the authority to engage in prevention, deterrence, and remediation of unconstitutional action, as well as simple prohibition of such action. *Ex parte Virginia*, 100 U.S. 339, 345 (1880); see also Gov't Br. 22 n.22. Section 5 thus allows Congress to "paint with a much broader brush than may this Court, which must confine itself to the judicial function of deciding individual cases and controversies upon individual records." *Fullilove v. Klutznick*, 448 U.S. 448, 501 n.3 (1980) (opinion of Powell, J.).

Respondents mistakenly claim (Br. 44) that no holding of this Court supports a congressional exercise of its protective enforcement authority under Section 5 to prohibit classifications subject only to rational basis review. Congress extended Title VII's ban on gender discrimination to the States in 1972, at a time when this Court had held that gender distinctions warranted only rational basis scrutiny. See Gov't Br. 21 & n.21. While this Court later determined that gender discrimination merited heightened scrutiny, it never suggested that Congress was wrong to act in the absence of a judicial determination to that effect. Indeed, the Court found the considered legislative judgment embodied in Title VII significant in coming to the conclusion that gender distinctions merited heightened judicial scrutiny. See *Frontiero v. Richardson*, 411 U.S. 677, 687-688 (1973)



(plurality opinion) ("Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the [constitutional] question presently under consideration."). That history demonstrates that Section 5 does not confine Congress to a reactive role or to prohibiting only those classifications that have been judicially determined to warrant heightened scrutiny.

Respondents' suggestion (Br. 44-45) that *Oregon v. Mitchell*, 400 U.S. 112 (1970), forecloses Section 5 legislation targeted at age discrimination is incorrect. To the contrary, while the Court invalidated Congress's effort to lower the voting age in state elections, no Justice advanced the view that Congress lacked the power to proscribe arbitrary age classifications or to enforce rights subject only to rational basis scrutiny.<sup>4</sup> Since that would have been a much more straightforward argument than any theory offered by a Justice in the majority, the failure to advance it strongly suggests that the power exists.

Finally, respondents' concern (Br. 46-47) that adherence to Section 5's plain text would afford Congress virtually unbridled legislative authority is misplaced, because the threat to Fourteenth Amendment rights against which Congress may legislate must be real and not speculative. See *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199, 2208-2210 (1999).

<sup>4</sup> Justice Harlan concluded that the legislation was invalid because, in his view, the Fourteenth Amendment simply did not encompass "political rights" like the right to vote. *Oregon*, 400 U.S. at 140. Justice Black concluded that the Constitution exclusively reserves to the States the power to set voter qualifications. *Id.* at 124-130. Justice Stewart, joined by Chief Justice Burger and Justice Blackmun, agreed with Justice Black, and also concluded that there was no basis for Congress to determine that the particular age classification prohibited by Congress constituted invidious discrimination. See 400 U.S. at 203-206. Four Justices considered the statute to be appropriate enforcement legislation. *Id.* at 138-144 (Douglas, J.); *id.* at 239-250, 278-281 (Brennan, White, & Marshall, JJ.).

**C. Congress Determined, On An Ample Record, That Unconstitutional Discrimination Against Older Workers Is Sufficiently Widespread To Warrant Preventive And Remedial Legislation**

The legislative history of the ADEA amply documents Congress's conclusion that older workers were widely subjected to "invidious" employment policies that were "rooted in past prejudices," that were "as insidious, as damaging, and as deplorable as racial or religious discrimination," and that resulted in "cruel, senseless discrimination" so irrational that some employers lowered their performance standards rather than hire older workers. See Gov't Br. 31-36. Moreover, "Congress \* \* \* established that [those] same conditions existed in the public sector," including state governments. *Goshtasby v. Board of Trustees*, 141 F.3d 761, 772 (7th Cir. 1998); see also Gov't Br. 36-38 & nn.40, 41.

1. Respondents and Ohio are mistaken to argue (Br. 1-3, 31-39, Ohio Br. 20-21, 29) that the existence of state laws proscribing age discrimination in employment undercuts any congressional judgment that there either was a history or is a contemporary threat of unconstitutional age discrimination by state employers. First, Congress was entitled to credit the testimony and evidence before it, some of which was provided by state officials themselves, demonstrating that state age discrimination laws generally were ineffective and that national legislation was needed.<sup>5</sup> Just as state laws against

<sup>5</sup> See Gov't Br. 47 & n.52; *Age Discrimination in Employment: Hearings on H.R. 3651, H.R. 3768, H.R. 4221 Before the Gen. Subcomm. on Labor of the House Comm. on Educ. & Labor, 90th Cong., 1st Sess.* 184 (1967) (California study noting that state officials with employment responsibilities "are human beings and like other human beings have acquired attitudes over the years which influence their decisions"); *id.* at 334 (in combating age discrimination, California "took a step and then sat down to contemplate our temerity, and there, \* \* \* legislative and otherwise, we still sit"); see also *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 114 (1991) ("It also may well be that Congress thought state agency consideration generally inadequate to ensure full protection



race discrimination in employment have neither eradicated race discrimination nor undermined the basis for subjecting state employers to federal bans on race discrimination,<sup>6</sup> Congress was entitled to conclude that the same holds true for state laws against age discrimination.

Second, an equal protection violation in public employment is complete when a public official takes action for an invidiously discriminatory reason; the existence of a remedy does not eradicate the violation.<sup>7</sup> Indeed, the existence of so many state statutes prohibiting age discrimination in public employment could well be evidence that such discrimination is sufficiently pervasive to warrant a legislative remedy, rather than evidence that state laws have eradicated the problem.

2. Respondents assert that no court has found a state age classification unconstitutional (Br. 35), and thus that Congress could not credibly have found a history of unconstitutional age discrimination by state agencies. They are mistaken as to both the facts and the appropriate inference to be

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against age discrimination in employment"; citing New York's own amicus curiae brief noting "the shortfalls of its procedures and resources").

<sup>6</sup> See, e.g., H.R. Rep. No. 238, 92d Cong., 1st Sess. 17 (1971) (although 37 States had equal employment opportunity laws at the time Title VII was extended to the States, Congress determined that race discrimination was as pervasive in state employment decisions as it was in the private sector); S. Rep. No. 415, 92d Cong., 1st Sess. 10, 19 (1971) (same).

<sup>7</sup> See *United States v. Raines*, 362 U.S. 17, 25 (1960) ("Congress has the power to provide for the correction of the constitutional violations of every such official without regard to the presence of other authority in the State that might possibly revise their actions."). Respondents (Br. 38-39) and Ohio (Br. 20) thus err in relying on *Florida Prepaid*, *supra*. That decision found the potential existence of state remedies relevant because the constitutional right being enforced there was the right to procedural due process after a taking—that is, the right to a remedy under state law. 119 S. Ct. at 2208. Accordingly, the adequacy of state remedies was important because their existence could prevent a constitutional violation from coming to fruition.

drawn. Courts have in fact struck down age discrimination by state agencies as a denial of equal protection.<sup>8</sup>

More importantly, Congress is not a court. It has distinctive institutional capacities that enable it to identify, remedy, and prevent constitutional violations that might escape discovery within the confines of individualized courtroom litigation. While Congress is bound by this Court's holdings that distinctions based on age violate the Fourteenth Amendment only if they are arbitrary and irrational, Congress is not confined to courtroom procedures for receiving and analyzing evidence in its effort to identify situations that "threaten [that] principle[] of equality" (*City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (opinion of O'Connor, J.)). To the contrary, Congress "may inform itself through factfinding procedures such as hearings that are not available to the courts." *Bush v. Lucas*, 462 U.S. 367, 389 (1983). Congress's "special attribute as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue"; it need not "confine its vision to the facts and evidence adduced by particular parties." *Fullilove*, 448 U.S. at 502-503 (Powell, J., concurring). Indeed, Congress can find invidious discrimination in state action "even though a court in an individual lawsuit might not have reached that factual conclusion." *Oregon*, 400 U.S. at 296 (Stewart, J.). "The degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of

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<sup>8</sup> See *Gault v. Garrison*, 569 F.2d 993, 996-997 (7th Cir. 1977), cert. denied, 440 U.S. 945 (1979); *Cooper v. Nix*, 496 F.2d 1285, 1287 (5th Cir. 1974); *Industrial Claim Appeals Office v. Romero*, 912 P.2d 62, 66-70 (Colo. 1996). Moreover, the absence of more such cases may be due in part to the fact that most courts have held that the ADEA precludes Equal Protection Clause suits under 42 U.S.C. 1983 (1994 & Supp. III 1997). See, e.g., *Migneault v. Peck*, 158 F.3d 1131, 1140 (10th Cir. 1998), petition for cert. pending, No. 98-1178; *Lafleur v. Texas Dep't of Health*, 126 F.3d 758 (5th Cir. 1997); *Zombro v. Baltimore City Police Dep't*, 868 F.2d 1364 (4th Cir.), cert. denied, 493 U.S. 850 (1989).

remedies may vary with the nature and authority of the governmental body." *Croson*, 488 U.S. at 489 (opinion of O'Connor, J.). Congress's unique institutional capacity "to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations," *id.* at 490, thus does not merely echo, but supplements and complements the Court's own enforcement of the Equal Protection Clause.

Contrary to respondents' suggestion (Br. 37), the ADEA does not reflect a congressional attempt to change the substance of the equal protection right. The ADEA enforces the precise equal protection right defined by this Court, namely, a right against age discrimination that is "arbitrary or irrational" (*Cleburne*, 473 U.S. at 446), "divorced from any factual context from which we could discern a relationship to legitimate state interests" (*Romer v. Evans*, 517 U.S. 620, 635 (1996)). Applying that same legal test to the wealth of information it compiled over two decades of study, hearings, reports, and testimony regarding the use of age in employment decisionmaking nationwide in a variety of contexts, Congress concluded that employment decisions based on age are in general too arbitrary or irrational to pass constitutional muster. See Gov't Br. 46 n.51. It is thus the decision-making forum, not the right, that has changed.

3. Respondents argue (Br. 33) that the ADEA was not aimed at any irrational age discrimination in the public sector, but rather at the disparity in treatment between public and private sector employees. That argument assumes an inconsistency between the two objectives that does not exist. A legislature that finds many age classifications arbitrary and irrational, and prohibits the use of such classifications in the private sector, will have not one but two reasons for extending the ban to the public sector: eliminating irrational age classifications and eliminating the disparity between public and private sector employees.

The legislative record demonstrates that both objectives were salient to Congress. Senator Bentsen first called for the extension of the ADEA to the States because of the "mounting evidence" that "State and local governments have also been guilty of discrimination toward older employees." 118 Cong. Rec. 7745 (1972). Senator Smathers advised that "many State governments" flatly state that "[w]e do not take on anyone who has reached the age of 35 or 45." 110 Cong. Rec. 13,490 (1964). Other Members of Congress and the Committee Reports echoed that concern about arbitrary and irrational acts of age discrimination by State employers. See Gov't Br. 37 & n.40. Indeed, the State of California submitted to Congress its own study of age discrimination in California public agencies, which showed that, despite the existence of a state-law prohibition, state agencies impermissibly relied upon age. *Id.* at n.40. Respondents thus are simply mistaken in their claim (Br. 38) that Congress "did not unearth a single shard of State misconduct."<sup>9</sup>

Respondents insist (Br. 34-37), however, upon more elaborate and particularized findings or legislative history detailing constitutional violations by the States, with supporting documents included in the "record" so that they can be subjected to examination and rebuttal (Br. 36). But nothing in the "finely wrought and exhaustively considered procedure," *INS v. Chadha*, 462 U.S. 919, 951 (1983), that Article I, Section 7 of the Constitution establishes for federal legislation requires Congress to identify the purpose of, or factual predicate for, its laws. The Constitution authorizes Congress to conduct investigations and hold hearings to gather information regarding national problems, incidental to lawmaking,

<sup>9</sup> The Pennsylvania House Republican Caucus errs in asserting (Br. 10 n.27) that evidence Congress gleaned of state age discrimination during the ADEA's enactment in 1967 is irrelevant. See *Fullilove*, 448 U.S. at 503 (Powell, J., concurring) ("One appropriate source [of evidence for Congress] is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation.").



see *Watkins v. United States*, 354 U.S. 178, 187 (1957), and gives it broad discretion to determine what must be published in the official record, see *Field v. Clark*, 143 U.S. 649, 671 (1892). There is no textual basis for imposing additional requirements on the lawmaking process. Thus, "Congress need [not] make particularized findings in order to legislate." *Perez v. United States*, 402 U.S. 146, 156 (1971).<sup>10</sup>

Accordingly, the question before this Court is simply whether Congress could reasonably conclude that the ADEA prevents state employers from relying upon the same arbitrary and irrational myths and false stereotypes about older workers that it found pervaded the private sector and the federal government. Respondents argue both that Congress did not in fact reach a constitutional judgment (Br. 35), and that any such judgment would not be supported by the evidence before Congress (*id.* at 35-39). But they are wrong.

First, it blinks reality to assert, as respondents do (Br. 35-39), that Congress's stark description of employers' uses of age as "invidious," "wholly irrational," "unjustifiable," "completely arbitrary," "rooted in past prejudices," "stereotyped," and "as insidious, as damaging, and as deplorable as racial or religious discrimination" (see Gov't Br. 35 & n.38, 38) lacks constitutional underpinnings. That is not the language of economic "policy" (Resp. Br. 35). The constitutional character of Congress's judgment is further underscored by its coupling of that censure with the additional determination that the rationales offered for age classifications by employers were the product of myths and stereotypes, rather than objective reality. See Gov't Br. 31-32 & nn.33-34, 35 & n.38. Congress did not merely disagree with the economic

<sup>10</sup> See also *United States v. Lopez*, 514 U.S. 549, 562 (1995) ("Congress normally is not required to make formal findings."); *Fullilove*, 448 U.S. at 502 (Powell, J., concurring) ("Congress is not expected to act as though it were duty bound to find facts and make conclusions of law."); *Katzenbach v. McClung*, 379 U.S. 294, 299 (1964) ("[N]o formal findings were made, which of course are not necessary.").

policies of private and governmental employers; it found in traditional equal-protection language that discrimination against older workers was predicated on "mere negative attitudes" and "vague, undifferentiated fears" (*Cleburne*, 473 U.S. at 448-449) "divorced from any factual context from which we could discern a relationship to legitimate state interests" (*Romer*, 517 U.S. at 635). Congress's repeated analogizing of the ADEA to Title VII and of age discrimination to unconstitutional race and gender discrimination<sup>11</sup> further belies the suggestion that Congress was merely advocating economic policy in the ADEA. See also *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 361 (1995) ("The ADEA, like Title VII, is not a general regulation of the workplace but a law which prohibits discrimination.").

Second, as for the adequacy of the legislative record, the evidence on which Congress found a threat to constitutional rights under the ADEA at least equals the legislative record on which Title VII's ban on gender discrimination was extended to the States. Cf. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (upholding Title VII's abrogation of Eleventh Amendment immunity in gender discrimination case).<sup>12</sup> The legisla-

<sup>11</sup> See, e.g., S. Rep. No. 690, 93d Cong., 2d Sess. 55 (1974); H.R. Rep. No. 913, 93d Cong., 2d Sess. 40 (1974); 110 Cong. Rec. at 2597 (Rep. Pucinski); *id.* at 9912 (Sen. Smathers); *id.* at 13,491 (Sen. Gore); 112 Cong. Rec. 20,821 (1966) (Sen. Javits); 113 Cong. Rec. 31,256-31,257 (1967) (Sen. Young); *id.* at 34,742 (Rep. Burke); *id.* at 34,744 (Rep. Kelly); *id.* at 34,746 (Rep. Olsen); 118 Cong. Rec. at 15,895 (Sen. Bentsen) ("I believe that the principles underlying these provisions in the EEOC bill are directly applicable to the [ADEA]."); 123 Cong. Rec. 29,004-29,005 (1977) (Rep. Findley); *id.* at 29,009 (Rep. Pepper); *id.* at 29,011 (Rep. Cohen); *id.* at 29,014 (Rep. Waxman); *id.* at 30,557 (Rep. Hillis); *id.* at 30,563 (Rep. Pepper); *id.* at 30,566 (Rep. McKinney); H.R. Rep. No. 756, 99th Cong., 2d Sess. 7 (1986); S. Rep. No. 493, 95th Cong., 1st Sess. 3 (1977); *id.* at 34 (additional views); see also Gov't Br. 27 & nn.28, 29, 35.

<sup>12</sup> The ADEA's legislative record far surpasses what Congress compiled in the course of enacting other Section 5 legislation as well. See *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67 (1986) (Title VII's ban on religious discrimination); *Fullilove*, 448 U.S. at 458-462 (opinion of



tive record supporting the extension of Title VII to the States in 1972 contained specific evidence and findings of race discrimination by state and local government employers, but only general statistics demonstrating the disparity between women and men in wages and employment opportunity, and general data concerning women employed in higher education, the professions, and the federal government; it contained no specific data or findings regarding women in state or local government.<sup>13</sup> In addition, the record contains the same types of observations that, under the ADEA, respondents dismiss as the language of policy and not constitutional violation.<sup>14</sup>

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Burger, C.J.); *Oregon*, 400 U.S. at 216 (Harlan, J.); *Katzenbach v. Morgan*, 384 U.S. 641, 654 & n.14 (1966); *id.* at 669 & n.9 (Harlan, J., dissenting) (literacy test ban was added to statute on the floor of Congress).

<sup>13</sup> See 118 Cong. Rec. at 1840 (Sen. Javits) (specifically citing evidence of discrimination against minorities by state and local governments, but referencing only "overall figures" for women); *id.* at 1816-1819, Exhibit 1 (findings only as to racial discrimination); *id.* at 1815 (Sen. Williams) (offering only general statistics demonstrating disparity between women and men in wages and employment opportunity); S. Rep. No. 415, 92d Cong., 1st Sess. 7 (1971); 118 Cong. Rec. at 4935 (Tables); *id.* at 4817-4818 (Sen. Stevenson); *id.* at 3800 (Sen. Williams); *id.* at 1383 (Sen. Percy); *id.* at 590 (Sen. Humphrey); *id.* at 580 (Sen. Javits); *id.* at 295 (Sen. Williams); 117 Cong. Rec. 31,960 (1971) (Rep. Perkins); *id.* at 32,096 (Rep. Abzug); *id.* at 32,104 (Rep. Fraser).

<sup>14</sup> H.R. Rep. No. 238, *supra*, at 4 (generally describing employers' treatment of women as "blatantly disparate" and "particularly objectionable"); S. Rep. No. 415, *supra*, at 8 (inequities are "blatant" and "widespread"); 117 Cong. Rec. at 31,960 (Rep. Perkins) (treatment of women is "disappointing"); 118 Cong. Rec. at 3383 (Sen. Javits) ("very serious"); *id.* at 1840 (Sen. Javits) ("something is not right"); *id.* at 1383 (Sen. Percy) ("glaring" inequities); *id.* at 590 (Sen. Humphrey) ("unconscionable"); *id.* at 4817 (Sen. Stevenson) (a "grave problem"); 117 Cong. Rec. at 31,975 (Rep. Drinan) ("outrageous," a "disgrace," "pervasive," and "serious"); *id.* at 32,105 (Rep. Mink) (an "injustice"). The isolated references made to the Constitution in the context of gender discrimination noted only the unremarkable propositions that the Constitution prohibits discrimination by state and local governments, S. Rep. No. 415, *supra*, at 10; 118 Cong. Rec. at 1816 (Sen. Williams), and that race- or sex-based discrimination can

4. Finally, respondents argue (Br. 27-30) that, regardless of the constitutional and legislative foundation for the ADEA, the statute cannot be upheld because Congress did not "warn[]" (*id.* at 11) them that it would defend its legislation on Section 5 grounds. Nothing in the Constitution, however, makes Congress's explicit invocation of authority a prerequisite to the valid enactment of legislation. This Court has explained that Congress need not "anywhere recite the words 'section 5' or 'Fourteenth Amendment' or 'equal protection.'" *EEOC v. Wyoming*, 460 U.S. 226, 243 n.18 (1983). Instead, "congressional legislation [may be] defended on the basis of Congress' powers under § 5 of the Fourteenth Amendment" if the Court is "able to discern some legislative purpose or factual predicate that supports the exercise of that power." *Ibid.* Similarly, in *United States v. Harris*, 106 U.S. 629 (1883), this Court held that, when the power of Congress to pass legislation is questioned, it is "necessary to search the Constitution to ascertain whether or not the power is conferred," and consider those provisions that only "in the remotest degree" have potential application to the statute at issue. *Id.* at 636 (emphasis added).<sup>15</sup> Those holdings reflect the fundamental

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violate the Constitution, *id.* at 1412 (Sen. Byrd). Congressional hearings on the 1972 amendments also were silent on the subject of unconstitutional gender discrimination by State governments. See *Equal Employment Opportunities Enforcement Act of 1971: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor & Pub. Welfare*, 92d Cong., 1st Sess. (1971); *Equal Employment Opportunity Enforcement Procedures: Hearings Before the Gen. Subcomm. on Labor of the House Comm. on Educ. & Labor*, 92d Cong., 1st Sess. (1971); *Equal Employment Opportunity Enforcement Procedures: Hearings Before the Gen. Subcomm. on Labor of the House Comm. on Educ. & Labor*, 91st Cong., 1st & 2d Sess. (1969-1970); *Equal Employment Opportunities Enforcement Act: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor & Pub. Welfare*, 91st Cong., 1st Sess. (1969).

<sup>15</sup> See also Gov't Br. 18 n.18; *United States v. Butler*, 297 U.S. 1, 61 (1936); *Keller v. United States*, 213 U.S. 138, 147 (1909); cf. *Fullilove*, 448 U.S. at 476-478 (opinion of Burger, C.J.) (holding that legislation could be a

separation of powers principle that a court should undertake the delicate and constitutionally sensitive task of invalidating legislation duly enacted by the Congress and President only when legislation is beyond Congress's power, and not simply because Congress enacted perfectly valid legislation with an arguably incomplete accompanying legislative history.

Respondents' reliance (Br. 28) on *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), is misplaced. "*Pennhurst* established a rule of statutory construction to be applied where statutory intent is ambiguous," *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991), not a rule of constitutional limitation. *Pennhurst* "simply ha[s] no relevance to the question of whether, in this [ADEA] case, Congress acted pursuant to its powers under § 5" because "there is no doubt" that Congress intended to extend the ADEA to the States. *Wyoming*, 460 U.S. at 244 n.18.<sup>16</sup> In any event, Congress's repeated comparisons of the ADEA to Title VII—

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proper exercise of Section 5 power even though Congress never referenced that power in the statute or its legislative history).

<sup>16</sup> Respondents' reliance (Br. 29) on a footnote from *Florida Prepaid*, 119 S. Ct. at 2208 n.7, is likewise misplaced. The Court did not in that footnote establish a new rule requiring Congress to state the constitutional authority for its legislation. The Court merely concluded that, where the statute and legislative history were devoid of any "suggestion \* \* \* that Congress had in mind the Just Compensation Clause," *ibid.*, the Court would not consider whether the Patent Remedy Act enforced that Clause. *Ibid.* The Court's disinclination to consider the Just Compensation Clause in *Florida Prepaid* thus was simply a straightforward application of the long-established principle that the Court must be able to "discern some legislative purpose or factual predicate" for each claimed exercise of the Section 5 power. *Wyoming*, 460 U.S. at 243 n.18. In this case, by contrast, the connection between the anti-discrimination statute and the enforcement of the Equal Protection Clause is obvious; the central command of the Equal Protection Clause is to prohibit arbitrary discrimination by the States, and any statute that, by its name as well as its terms, prohibits a State from engaging in arbitrary discrimination is necessarily grounded, at least in part, in that Clause.

which also was originally enacted as Commerce Clause legislation and later extended to the States under Congress's Section 5 power—and other aspects of the ADEA's legislative history more than sufficed to "warn" respondents of Congress's design.<sup>17</sup>

#### D. The ADEA Is Reasonably Tailored

The ADEA's proof scheme is tailored to ferreting out intentional and irrational uses of age by employers. The Act generally requires plaintiffs to bear the ultimate burden of showing that they were treated adversely because of age. If the employer can identify a reasonable justification for its action other than age or can show that the use of age was reasonably necessary, then the employer will prevail. While the burdens of proof are different from those in an action under 42 U.S.C. 1983 (1994 & Supp. III 1997), the core conduct for which States will be liable—unreasoned and unreasonable uses of age—remains the same. See Gov't Br. 39-42.

Respondents argue that the ADEA is not properly tailored because, like Title VII, it "applies in equal measure to State and private employers," is of indefinite duration (Br. 39), and in many other respects is modeled on Title VII (*id.* at 40-44). Respondents contend that Title VII's statutory scheme is congruent and proportional to the regulation of race discrimination, which is presumptively unconstitutional, but not to the regulation of age discrimination, which is not. *Ibid.* As an initial matter, the distinction between the purposes of Title VII and the ADEA is not so sharp: Title VII prohibits discrimination based not only on race, but also on

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<sup>17</sup> See Gov't Br. 18 n.18; *Age Discrimination in Employment Act Amendments: Hearing Before the Subcomm. on Employment Opportunities of the House Comm. on Educ. & Labor*, 98th Cong., 2d Sess. 122 (1984) (courts have repeatedly sustained the ADEA under "§ 5 of the Fourteenth Amendment") (Clarence Thomas); *Amendments in the Age Discrimination in Employment Act of 1967: Hearing on H.R. 14879, H.R. 15342 Before the Subcomm. on Equal Opportunities of the House Comm. on Educ. & Labor*, 94th Cong., 2d Sess. 57-58, 236-241 (1976).



gender, which fell within the same presumptively rational category as age at the time Title VII was extended to the States. Second, the relevant features of the statutory scheme are as well suited to one form of discrimination as the other.

Respondents object (Br. 43-44) to the ADEA's burden-shifting scheme. But the shifting of litigation burdens is a reasonable and frequently employed means of exposing intentional, invidious discrimination, because it "sharpen[s] the inquiry into the elusive factual question of intentional discrimination." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.8 (1981); cf. *Lopez v. Monterey County*, 119 S. Ct. 693, 703 (1999). Burden shifting does not change the ultimate legal inquiry, but simply serves as a means of organizing the evidence to determine whether the actual cause of the adverse action was age or some other factor. See *Wichmann v. Board of Trustees of So. Ill. Univ.*, 180 F.3d 791, 800 (7th Cir. 1999) (the ADEA "does not require searching judicial scrutiny, but is more like a rationality test in forbidding discrimination on the arbitrary grounds of age") (internal quotation marks omitted).

Respondents protest (Br. 40-42) that the ADEA's scrutiny of mandatory retirement laws differs from the Constitution's. To be sure, the ADEA's operation does not parrot rational basis review. Nor do the Voting Rights Act or Title VII mimic their respective constitutional tests. Congress's Section 5 power is not confined "to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional." *Katzenbach v. Morgan*, 384 U.S. 641, 648-649 (1966). Section 5 allows Congress to prohibit activities that are not themselves unconstitutional as long as to do so reasonably furthers Congress's remedial and deterrent scheme. *City of Boerne v. Flores*, 521 U.S. 507, 518, 520, 525-527, 532 (1997).

Respondents, moreover, are largely chasing phantoms. As respondents frequently remind us, all 50 States proscribe

age discrimination by their own laws<sup>18</sup> and have largely abolished mandatory retirement laws and other across-the-board uses of age in employment decisions (other than those public-safety laws that the ADEA also permits). The bulk of litigation under the ADEA concerns ad hoc, individualized employment decisions.<sup>19</sup> No legitimate government interest is furthered when, in a regime of individualized assessments of competency, a qualified person is fired (or not hired or promoted) simply because he or she is old. This is the core constitutional violation addressed by the ADEA.

Respondents make no claim that the ADEA's review of such individualized employment decisions departs so dramatically from the Constitution's as to render Congress's remedial scheme unreasonable. A primary rationale under which this Court sustained the mandatory retirement policies—that democratically-elected bodies had chosen to use age as an across-the-board rule to avoid individualized determinations of qualifications<sup>20</sup>—obviously has little relevance to the constitutionality of ad hoc employment decision-

<sup>18</sup> Respondents' complaint (Br. 1) that the ADEA "displace[s]" state age discrimination laws is puzzling. Given that "[v]irtually all of them forbid the same practices as the ADEA, and many of them offer more avenues of relief than the ADEA itself" (*id.* at 2-3), the ADEA has no effect on the operation of those state laws. To the contrary, the ADEA's structure respects and supports application of those laws by requiring that state age discrimination remedies be invoked before an ADEA suit commences. 29 U.S.C. 633(b).

<sup>19</sup> Our own research found that, of the 32 district court opinions reported on Westlaw for 1998 involving ADEA suits against state employers, 28—or 88%—involved challenges to individualized employment decisions, rather than to broad age-based policies. (A list of the 32 decisions is reproduced in an appendix to this brief.) See also H. Eglit, *The Age Discrimination in Employment Act at Thirty*, 31 Univ. Rich. L. Rev. 579, 622 (1997); G. Rutherglen, *From Race to Age: The Expanding Scope of Employment Discrimination Law*, 24 J. Legal Stud. 491, 510 (1995).

<sup>20</sup> *Gregory*, 501 U.S. at 471-473; *Vance v. Bradley*, 440 U.S. 93, 108-109 (1979); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 316 (1976).



making.<sup>21</sup> That is especially true when, as occurs in most cases, employers do not contend that the use of age was justified, but that age was not the basis of the decision. In short, reality belies respondents' claim (Br. 40-44) that the ADEA broadly impinges on any state sovereign right to discriminate in employment on the basis of age.<sup>22</sup>

\* \* \* \* \*

For the foregoing reasons, and for those stated in our opening brief, the judgments of the court of appeals should be reversed, and the cases remanded for further proceedings.

Respectfully submitted.

SETH P. WAXMAN  
Solicitor General

SEPTEMBER 1999

<sup>21</sup> The contrasting approaches and results in *Cleburne, supra*, and *Allegheny Pittsburgh Coal Co. v. County Commission*, 488 U.S. 336 (1989), compared with *Heller v. Doe*, 509 U.S. 312 (1993), and *Nordlinger v. Hahn*, 505 U.S. 1 (1992), evidence the practical constitutional differences under the rational-basis standard between challenges to general governmental policymaking and to individualized decisionmaking by government officials. See also *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998) (judicial test for substantive due process violation by individual officer differs from that for actions of legislative body).

<sup>22</sup> Ohio objects (Br. 27-28) that the possibility of disparate impact litigation renders the ADEA too burdensome to be valid Section 5 legislation. But, to the extent disparate impact claims are available under the ADEA (see Gov't Br. 41 n.45), the States are subject to that substantive prohibition as a concededly-valid exercise of the Commerce Clause power (Resp. Br. 14; Ohio Br. 29) and it can be enforced against them in federal court by private litigants under *Ex parte Young*, 209 U.S. 123 (1908). Thus the Section 5 issue presented in this case will have no impact on whether States must conform their employment practices to a substantive disparate impact standard.

## APPENDIX

The following is a list of the 32 district court opinions reported on Westlaw for 1998 involving ADEA suits against state employers:

*Zielonka v. Topinka*, 28 F. Supp. 2d 1081 (N.D. Ill. 1998);

*Munjal v. Board of Trustees of Univ. of Ill.*, No. 97 C 2222, 1998 WL 895660 (N.D. Ill. 1998);

*Keenan v. New York State Div. for Youth*, No. 97-CV-0133E(M), 1998 WL 864914 (W.D.N.Y. Dec. 4, 1998);

*Willett v. Department of Children & Family Serv.*, No. 98 C 4715, 1998 WL 867406 (N.D. Ill. Dec. 3, 1998);

*Beller v. Board of Trustees of Univ. of Ill.*, No. 97 C 4888, 1998 WL 832636 (N.D. Ill. Nov. 24, 1998);

*Naval v. Fernandez*, No. 97-CV-6800, 1998 WL 938942 (E.D.N.Y. Nov. 20, 1998);

*Valdivia v. University of Kan. Med. Ctr.*, 24 F. Supp. 2d 1177 (D. Kan. 1998);

*Driesse v. Florida Bd. of Regents*, 26 F. Supp. 2d 1328 (M.D. Fla. 1998);

*Kaplan v. California Pub. Employees' Retirement Sys.*, No. C 98-1246 CRB, 1998 WL 575095 (N.D. Cal. Sept. 3, 1998);

*Gomes v. California Dep't of Corrections*, No. C97-1072 MJJ, 1998 WL 556578 (N.D. Cal. Aug. 31, 1998);

*Meekison v. Voinovich*, 17 F. Supp. 2d 725 (S.D. Ohio 1998);

*Weiner v. City College of City Univ. of N.Y.*, No. 95 CIV. 10892 (JFK), 1998 WL 474093 (S.D.N.Y. Aug. 11, 1998);

*Heckman v. University of N.C.*, No. 1:97CV00184, 19 F. Supp. 2d 468 (M.D.N.C.), appeal dismissed, 166 F.3d 1209 (4th Cir. 1998);

*Jones v. University of Tex.*, No. CA 3:97-CV-0845-R, 1998 WL 460283 (N.D. Tex. July 29, 1998);

*McGinty v. New York*, 14 F. Supp. 2d 241 (N.D.N.Y. 1998);

*Gately v. Massachusetts*, No. CIV.A.92-13018-MA, 1998 WL 518179 (D. Mass. June 8, 1998);

*Glab v. California State Bd. of Equalization*, No. 98 C 3012, 1998 WL 293189 (N.D. Ill. May 22, 1998);

*Fisher v. Maryland Dep't of Housing and Community Dev.*, 32 F. Supp. 2d 257 (D. Md.), aff'd, 166 F.3d 1208 (4th Cir. 1998);

*Alaimo v. SUNY*, No. 97-CV-0285E(H), 1998 WL 214743 (W.D.N.Y. Apr. 27, 1998);

*Eible v. Houston*, No. CIV. A. 96-4655, 1998 WL 303692 (E.D. Pa. Apr. 21, 1998), aff'd, No. 98-1736 (3d Cir. Apr. 13, 1999), petition for cert. pending, No. 99-238;

*Pease v. University of Cincinnati Med. Ctr.*, 6 F. Supp. 2d 706 (S.D. Ohio 1998), aff'd, No. 98-3583, 1999 WL 427373 (6th Cir. June 16, 1999);

*Recknall v. New York Power Auth.*, No. 94-CV-1675 (RSP/GLS), 1998 WL 178806 (N.D.N.Y. Apr. 8, 1998);

*Hines v. Ohio State Univ.*, 3 F. Supp. 2d 859 (S.D. Ohio 1998);

*Butler v. New York State Dep't of Law*, 998 F. Supp. 336 (S.D.N.Y. 1998);

*Schibrat v. New York State Hous. Fin. Agency*, No. 96 CIV. 2004 (JFK), 1998 WL 118171 (S.D.N.Y. Mar. 13, 1998);

*Snooks v. University of Houston, Clear Lake*, 996 F. Supp. 686 (S.D. Tex. 1998);

*Hall v. Missouri Highway and Transp. Comm'n*, 995 F. Supp. 1001 (E.D. Mo. 1998);

*Arnett v. CA Employees' Retirement*, No. C95-03022 CRB, 1998 WL 118180 (N.D. Cal. Mar. 2, 1998), rev'd, No. 98-15574, 1999 WL 618033 (9th Cir. June 2, 1999);

*Ullman v. Rector and Visitors of Univ. of Va.*, 996 F. Supp. 557 (W.D. Va. 1998);

*Young v. Pennsylvania House of Representatives, Republican Caucus*, 994 F. Supp. 282 (M.D. Pa. 1998);

*Haynes v. Florida*, No. 97-6339-CIV-GOLD, 1998 WL 271462 (S.D. Fla. Jan. 26, 1998);

*Boland v. Illinois Dep't of Mental Health and Developmental Disabilities*, No. 97C 2913, 1998 WL 25761 (N.D. Ill. Jan. 12, 1998).

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IN THE  
**Supreme Court of the United States**

J. DANIEL KIMEL, JR., *et al.*,  
v. *Petitioners,*

STATE OF FLORIDA BOARD OF REGENTS, *et al.*,  
*Respondents.*

UNITED STATES OF AMERICA,  
v. *Petitioner,*

FLORIDA BOARD OF REGENTS, *et al.*,  
*Respondents.*

On Writs of Certiorari to the  
United States Court of Appeals  
for the Eleventh Circuit

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**I. THE ADEA UNEQUIVOCALLY EXPRESSES CONGRESS' INTENT TO ABROGATE THE STATES' ELEVENTH AMENDMENT IMMUNITY**

FLSA § 16(b) provides that suits "may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees," and FLSA § 3(x) defines "public agency" to include "a State, or a political subdivision of a State." Congress drafted this language to provide the clear statement of its intent to abrogate the State's Eleventh Amendment immunity required by *Employees v. Missouri Public Health Dept.*, 411 U.S. 279 (1973). See Brief for Petitioners ("Pet. Br.") 18-19.

ADEA § 7(b) in its turn incorporates into that Act the FLSA § 16(b) right-of-action provision by reference. In this way the ADEA unequivocally expresses Congress' intent to abrogate State immunity from suits by employees in federal court.

1. Respondents' primary argument to the contrary is a series of semantic quibbles.

(a) Respondents would first sweep away the ADEA's incorporation of § 16(b) on the theory that § 16(b) refers to suits "to recover the liability prescribed in . . . the [first two] sentences [of § 16(b)]," and those sentences refer only to FLSA suits. Brief for Respondents ("Resp. Br.") 18.

*Hoffmann-LaRoche, Inc. v. Sperling*, 493 U.S. 165 (1989), forecloses that theory. Recognizing § 16(b)'s right-of-action provision as "one of the provisions the ADEA incorporates," *id.* at 167, the Court held that "[t]he ADEA, through incorporation of [16(b)], expressly authorizes employees to bring collective age discrimination actions 'in behalf of . . . themselves and other employees similarly situated.'" *Id.* at 170 (quoting § 16(b)). The language in § 16(b) which provides that employees may sue public agencies in federal court is part of the same sentence as the language applied in *Hoffmann-LaRoche* that allows such suits to be brought collectively. Thus,



just as “the ADEA, through incorporation of § [16(b)], expressly authorizes” employees to sue collectively, it likewise expressly authorizes them to sue the States in federal court.

In addition to ignoring *Hoffmann-LaRoche*, respondents ignore the language of ADEA § 7(b). The second sentence of § 7(b) states that violations of the ADEA “shall be deemed to be” violations of the FLSA, and the third sentence states that “[a]mounts owing to a person as a result of a violation of [the ADEA] shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections [16 and 17] of [the FLSA].” In turn, § 16(b)’s first sentence identifies “unpaid minimum wages” and “unpaid overtime compensation” as the “liab[ility]” an employer incurs for violating the wage and hour requirements of the FLSA. By operation of these interrelated provisions, an action to recover “[a]mounts owing to a person as a result of a violation of [the ADEA]” is a form of action “to recover the liability prescribed in” the opening sentences of § 16(b), and hence is covered by the FLSA right-of-action provision.<sup>1</sup>

(b) While ADEA § 7(b) thus accomplishes an incorporation by reference of the right-of-action provision of FLSA § 16(b), and does so in terms, respondents claim that there is a negative inference from ADEA § 7(c)(1) that overrides that express incorporation. Resp. Br. 17. Section 7(c)(1), as enacted in 1967 and as it continues to read, states that an aggrieved person “may bring a civil

<sup>1</sup> Indeed, the sole office of the “deeming” provisions in § 7(b) is to ensure that the references in § 16(b) to provisions of the FLSA will not operate, as respondents propose, to undo the incorporation of § 16(b) into the ADEA. In providing that violations of the ADEA “shall be deemed to be” FLSA wage and hour violations, Congress obviously was not suggesting that violations of the ADEA actually result in a failure to pay minimum wages or overtime compensation, or that ADEA monetary awards should be calculated as if that were the case.

action in any court of competent jurisdiction.” According to respondents, it is “inscrutable” that the 1974 Congress would both incorporate the FLSA right-of-action provision into the ADEA and leave ADEA § 7(c)(1) on the books. But the mystery respondents conjure up is not mysterious at all. There is no contradiction between § 7(b), with its incorporation by reference of FLSA § 16(b), on the one hand, and § 7(c)(1) on the other—the former is simply more detailed and the latter more general. Where, as in this instance, there is no contradiction, it is by no means uncommon for a legislative draftsman to preserve a preexisting provision for safety’s sake, even if it may no longer be strictly necessary in light of an amendment that deals with a subject in more detail.

(c) In a variation on the theme that § 7(c)(1)’s general right-of-action provision should be treated as overriding the more specific FLSA provision incorporated by § 7(b), respondents propose that § 7(b) should be construed as “incorporat[ing] some FLSA provisions but not those expressly covered in the ADEA itself.” Resp. Br. 18. That construct cannot be squared with § 7(b)’s language, which expressly incorporates the “powers, remedies, and procedures provided in section . . . [16] (*except for subsection (a) thereof*),” and “*provided that* liquidated damages [which § 16(b) makes routinely available for FLSA violations,] shall be payable only in cases of willful violations of [the ADEA].” The structure of § 7(b) thus establishes that, “but for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA.” *Lorillard v. Pons*, 434 U.S. 575, 578-80 (1978). And, one change Congress did *not* make was to exclude from incorporation those parts of § 16(b) that address matters “covered in the ADEA itself.” Resp. Br. 18.<sup>2</sup>

<sup>2</sup> Indeed, if respondents’ construction were correct, the *Hoffmann-LaRoche* Court should not have treated the collective-action provi-

2. Quoting *Dellmuth v. Muth*, 491 U.S. 223, 231-32 (1989), and *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 246 (1985), respondents declare that FLSA § 16(b) does not serve to abrogate State immunity in any event because “[a] general authorization for suit is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment.” Resp. Br. 18-19.

There is nothing “general” about what § 16(b) authorizes: that provision specifically authorizes employees to sue “public agencies,” including States, in state or federal court. See *supra* at 1. As the Court recognized in *Alden v. Maine*, 119 S.Ct. 2240, 2246 (1999), § 16(b) thus “purport[s] to authorize private actions against States . . . without regard for consent.” Section 16(b) therefore stands in sharp contrast to the right-of-action provision in *Dellmuth*, which stated only that an aggrieved party could “bring a civil action” in state or federal court, without specifying the classes of potential defendants against whom such an action could be brought, see 491 U.S. at 228; and no other provision of the statute “sp[oke] to what parties are subject to suit,” *id.* at 231. The statute in *Atascadero* likewise did not specifically refer to suits against a State. See 473 U.S. at 245-46.

Given the clarity of the language in § 16(b) and the fact that it was adopted by Congress for the precise purpose of satisfying the “clear statement” rule of *Missouri Employees*, respondents’ ultimate position is that that rule cannot be satisfied no matter how unequivocally Congress has authorized the maintenance of claims by private parties against States in federal court, unless Congress has *in addition* stated in so many words that the effect of its action is to “revoke the State’s right to assert one of the defenses—sovereign immunity—to those claims.” Resp.

sion of § 16(b) as having been incorporated into the ADEA, because the right to maintain an action is “covered in” ADEA § 7(c).

Br. 19. There is no support for that position in this Court’s decisions. As Justice Scalia, concurring in *Dellmuth*, pointed out, the Court’s decision in that case “does not preclude congressional elimination of sovereign immunity in statutory text that clearly subjects States to suit for monetary damages, though without explicit reference to state sovereign immunity or the Eleventh Amendment.” 491 U.S. at 233. And, there was no reference to sovereign immunity or the Eleventh Amendment in the statute at issue in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), yet the Court there held that Congress had adequately expressed its intent to provide a private cause of action abrogating the States’ immunity. See *id.* at 56-57.

## II. THE APPLICATION OF THE ADEA TO THE STATES IS WITHIN CONGRESS’ POWER UNDER SECTION FIVE OF THE FOURTEENTH AMENDMENT

Congress’ Fourteenth Amendment § 5 power to enact antidiscrimination legislation applicable to the States, such as the ADEA, is conditioned, respondents maintain, in three ways pertinent here: (i) Congress must explicitly ground the legislation in the Amendment, Resp. Br. 27-30, (ii) Congress must make specific findings of pervasive constitutional violations on the part of the States, *id.* at 30-39, and (iii) Congress’ enactment must be sufficiently proportionate “to a supposed remedial or preventive object” as to “be understood as responsive to, or designed to prevent, unconstitutional behavior,” *id.* at 39 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997)).

Respondents are wrong as a matter of law in the first two regards—this Court’s cases make it clear that Congress’ legislative authority does not depend on making the kinds of recitals and findings respondents would require. And while respondents correctly quote the proportionality



standard of *City of Boerne*, their conclusion that the ADEA does not meet that standard is wrong, because the conclusion is grounded on the erroneous premise that "it is difficult to imagine an act of age discrimination in employment that would rise to the level of a constitutional violation." Resp. Br. 26.

**A. Congress' Authority Is Not Dependent on an Express Invocation of Particular Constitutional Powers**

1. *EEOC v. Wyoming*, 460 U.S. 226, 243 n.18 (1983) rejects in terms respondents' "express invocation" limitation on Congress' § 5 legislative power:

It is in the nature of our review of congressional legislation defended on the basis of Congress' power under § 5 of the Fourteenth Amendment that we be able to discern some legislative purpose or factual predicate that supports the exercise of that power. That does not mean, however, that Congress need anywhere recite the words "Section 5" or "Fourteenth Amendment" or "equal protection," see, e.g., *Fullilove v. Klutznick*, 448 U.S. 448, 476-478 (1980) (Burger, C.J.), for "[t]he . . . constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948).

It is a principle of long standing in this Court that, when Congress' power to enact legislation is challenged, "[t]he question is . . . whether there is any authority conferred upon Congress by which this particular . . . statute can be sustained." *Keller v. United States*, 213 U.S. 138, 147 (1909). For that principle to apply, Congress need not "state the legal theory upon which [a statute] was enacted." *Id.* at 149 (Holmes, J., dissenting). Rather, the Court will consider all powers, stated or not, that "have any bearing upon the validity of the statute under review." *United States v. Butler*, 297 U.S. 1, 63 (1936).

As the Court explained in *United States v. Harris*, 106 U.S. 629 (1883), this rule is part and parcel of the presumption of constitutionality to which all legislation is entitled. "This presumption should prevail unless the lack of constitutional authority to pass an Act in question is clearly demonstrated." *Id.* at 635. Although "every valid Act of Congress must find in the Constitution some warrant for its passage," *id.* at 636, it falls to those challenging a statute to demonstrate that no such warrant exists. To determine whether such a demonstration has been made, a court must consider "[every] paragraph[] in the Constitution which can, in the remotest degree, have any reference to the question in hand." *Id.*

2. Against all this, respondents invoke two cases—*Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), and *Florida Prepaid Postsecondary Ed. Expense Board v. College Savings Bank*, 119 S.Ct. 2199, 2208 n.7 (1999). See Resp. Br. 28-29. As we have explained, *Pennhurst* states a rule for construing the substantive terms of an ambiguous statute, not a rule delimiting Congress' legislative power. See Pet. Br. 29 n.18. And the portion of *Florida Prepaid* to which respondents point stands for the proposition, not relevant here, that it is not proper for the courts in passing on the constitutionality of a statute to override Congress as to the relevant predicate authority for a legislative action where "Congress was so explicit about invoking its authority under [a particular constitutional provision]" and there is "no suggestion in the language of the statute itself, or in the [committee reports]" that Congress was relying on other constitutional provisions. 119 S.Ct. at 2208 n.7.

That rule of judicial deference has by its nature no application to the common situation in which Congress is not so explicit in invoking one predicate source of constitutional power as to require the conclusion that Congress must have regarded all other possible predicates as



inapplicable. Throughout this Court's jurisprudence, that common situation has been governed by the rule stated in *EEOC v. Wyoming*. The *Florida Prepaid* footnote cannot, as respondents would have it, be leveraged into an affirmative judicial requirement that Congress must state the constitutional predicate of its legislation at the pain of having the courts declare the enactment unconstitutional.

The situation governed by the *EEOC v. Wyoming* rule is the situation presented in this case. Respondents note that the relevant committee reports accompanying the 1974 legislation contain some references to interstate commerce—and a single reference to the commerce power itself—unaccompanied by any reference to the Fourteenth Amendment. See Resp. Br. 5, 33-34. But the ADEA provisions of that legislation comprised only one section of a 29-section Act, whose 28 other sections dealt with wage and hour issues rather than with any kind of discrimination issue. The references in the committee reports to interstate commerce pertain to those other sections.<sup>3</sup> In respect to the one section that extended the ADEA to the States, there is nothing in the Act or the legislative history which makes it "explicit [that Congress was] invoking its authority under [the Commerce Clause]," *Florida Prepaid*, 119 S. Ct. at 2208 n.7, much less that

<sup>3</sup> For example, the reference that appears in H.R. Rep. No. 93-913, at 2 (1974) is found in a section entitled "Purpose of the Legislation," which contains a detailed summary of the wage and hour provisions of the legislation but does not even make mention of the ADEA section of the Act.

It bears noting in this regard that the FLSA wage and hour provisions, by their terms, apply only to activities "in commerce." 29 U.S.C. §§ 206, 207. In contrast, although Congress provided that private employers must be "engaged in an industry affecting commerce" in order to be covered by the ADEA, see 29 U.S.C. § 630(b) (first sentence), the 1974 amendments extended the ADEA to "any agency or instrumentality of a State," without any requirement that the public body be engaged in commerce. *Id.* (second sentence).

Congress was doing so to the exclusion of other constitutional powers.<sup>4</sup>

**B. The ADEA's Status as Permissible Enforcement Legislation Under § 5 Does Not Depend on Whether Congress Made Explicit Findings of a Pervasive Pattern of Fourteenth Amendment Violations by the States**

Respondents' attack on the adequacy of Congress' findings regarding State age discrimination in employment is doubly defective.

1. (a) First, "Congress need [not] make particularized findings in order to legislate. . . , even in areas . . . where States historically have been sovereign." *United States v. Lopez*, 514 U.S. 549, 563, 564 (1995) (quoting *Perez v. United States*, 402 U.S. 146, 156 (1971)). "Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings." *Fullilove v. Klutznick*, 448 U.S. 448, 478 (1980) (opinion of Burger, C.J.). See also *Astoria Federal S. & L. Ass'n. v. Solimino*, 501 U.S. 104, 113-14 (1991) (ADEA provision denying preclusive effect to state agency rulings is reasonable because "[i]t . . . may well be that Congress thought state agency consideration generally inadequate to ensure full protection against age discrimination in employment," even though Congress made no formal finding to that effect).

To be sure, where the connection between a statute and an asserted source of congressional power is so attenuated as not to be "visible to the naked eye," *Lopez*, 514 U.S. at 563, congressional findings may assist in making the

<sup>4</sup> If it were appropriate to attempt "to enter the minds of the Members of Congress," see *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 30 (1989) (Scalia, J., concurring in part and dissenting in part) with respect to this matter, there is evidence that the primary sponsor of the ADEA's extension to the States—Senator Bentsen—may well have been relying on § 5. See Brief of the United States ("U.S. Br.") 18 n.18.

connection apparent. *Id.* But where, as is the case here, the provisions of a statute are on their face directed at a kind of discrimination that would violate the Fourteenth Amendment, *see* Pet. Br. 27-44, a requirement by the judiciary that Congress present explicit findings about the need for the legislation would be no more appropriate under our separation of powers than "an Act of Congress mandating long opinions from this Court," *Lopez*, 514 U.S. at 614 (Souter, J., dissenting).

(b) This Court's decisions under § 5 do not support respondents' argument that Congress' power to enforce the Fourteenth Amendment is conditioned on a special "findings" requirement. In *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the Court sustained a federal provision invalidating state laws requiring literacy in English as a condition of voting, on the ground, *inter alia*, that, by giving New York's Puerto Rican community "enhanced political power," the provision "may be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government . . . in the . . . administration of governmental services." *Id.* at 652. The Court reaffirmed the validity of *Morgan's* analysis on this point in *City of Boerne*, 521 U.S. at 528. Yet, in *Morgan* there was "no legislative record supporting such hypothesized discrimination." 384 U.S. at 669 and n.9 (Harlan, J., dissenting). In fact, there were "no committee hearings or reports [at all] referring to [the challenged provision]." *Id.*

So too, in *Maher v. Gagne*, 448 U.S. 122 (1980), where the Court upheld Congress' power to require States to pay attorney's fees to a plaintiff who prevails on "a wholly statutory, non-civil-rights claim" that is pendent to an unadjudicated constitutional claim, *id.* at 132, the Court did not refer to any findings of a pattern of unconstitutional State conduct in determining that Congress' authorization of such fee awards is "an appropriate means

of enforcing substantive rights under the Fourteenth Amendment." *Id.* at 133.<sup>5</sup>

(c) Respondents' proffered authority for their "special findings" requirement, once again, is inapposite. In *City of Boerne*, confronted with a statute that, on its face, was designed to create new rights rather than to enforce any right protected by the Fourteenth Amendment, *see* Pet. Br. 25-26, the Court looked to legislative history to see whether that history would confirm the Court's assessment of the statute, or whether it might reveal a constitutionally proper basis for the statute that was not apparent from the statute's text. *See* 521 U.S. at 530-31. In undertaking that examination, the Court took care to explain that it was *not* adopting a requirement of legislative findings, *id.* at 531-32:

Judicial deference, in most cases, is based not on the state of the legislative record Congress compiles but "on due regard for the decision of the body constitutionally appointed to decide." *Oregon v. Mitchell*, 400 U.S. [112 (1970)], at 207 (opinion of Harlan, J.). As a general matter, it is for Congress to determine the method by which it will reach a decision.

And in *Florida Prepaid* as well, the provisions of the Patent Remedy Act bore no apparent connection to matters that would fall within the purview of the constitutional provision (the Due Process Clause) offered as the source of Congress' legislative power. *See* Pet. Br. 26. Thus, in *Florida Prepaid* as in *City of Boerne*, no constitutional

<sup>5</sup> Nor did Congress make findings of a pattern of constitutional violations when it applied to the States the provisions of Title VII that require reasonable accommodation of employees' religious practices. *See Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67 (1986) (noting that the reasonable accommodation provision was adopted "with little discussion"). And, as far as we are aware, Congress made no findings of a pervasive pattern of constitutional violations on the part of the States when it applied to the States the provisions of Title VII that prohibit sex discrimination.



predicate for the legislation was "visible to the naked eye." *Lopez*, 514 U.S. at 563. Unsurprisingly, the Court turned to the statute's legislative history in search of a possible constitutional predicate. 119 S.Ct. at 2207-10. *Florida Prepaid* cannot fairly be read as establishing a rule that explicit findings of a pattern of unconstitutional behavior are essential where, as in this case but not in *Florida Prepaid*, the statute in question can be seen on its face to be directed at preventing and remedying conduct that has "a significant likelihood of being unconstitutional." *Id.* at 2210.

(d) Respondents' suggestion that the Court should impose a special "findings" requirement on § 5 so as to preclude a "parliamentary supremacy" that could "bend State sovereign functions to congressional will," Resp. Br. 22, is made of whole cloth. The Commerce Clause, no less than § 5, enables Congress to legislate in areas touching on state sovereignty—indeed, as the Court held in *EEOC v. Wyoming*, the Commerce Clause gives Congress the power to impose the substantive requirements of the ADEA on the States—but the Court has not imposed a "findings" requirement on Commerce Clause legislation. *Lopez, supra*.<sup>6</sup> There is no better warrant for imposing such a requirement on § 5 legislation.

<sup>6</sup> Despite their professed concern about the ADEA's impact on "sovereign functions," respondents acknowledge that the substantive provisions of the Act are properly applicable to the States. See Resp. Br. 14. The argument of the State amici that the ADEA "intrude[s] deeply into the operation of State government" therefore is beside the point. See Brief of Amici Curiae States of Ohio and Tennessee, *et al.* ("State Br.") 26. Like respondents, the State amici recognize that they cannot challenge "the ADEA itself." *Id.* at 2, 29. That is because this Court rejected in *Wyoming* the very kind of "intrusion" argument the amici advance. See 460 U.S. at 239-42. And, the amici's protestation that the ADEA hampers government operations is contradicted by their assertions that the "substantive protections" made applicable by the ADEA "are available in similar or better measure by the States' own laws," State Br. 29, and that state civil service laws, "designed to drain em-

2. We believe the foregoing is dispositive of respondents' demand for ever greater and better congressional findings. But there is more: respondents' claim that the congressional findings here are inadequate is so attenuated as to be ephemeral.

Even though the author of the provisions extending the ADEA to the States, Senator Bentsen, specifically stated that the evidence available to Congress "revealed that State and local governments have also been guilty of discrimination toward older employees," 118 Cong. Rec. 7745 (1972), and the committee reports are to the same effect, see U.S. Br. 37 n.40, it is argued (i) that Congress did not cite a sufficient number of examples of age discrimination by public employers, (ii) that some of the examples the legislators cited involved employees of the federal government or of local agencies rather than of state agencies, (iii) that Congress did not "clarify whether the identified conduct violates *equal protection*," and (iv) that in any event the existence of state laws prohibiting age discrimination in public employment precludes the possibility that the States might engage in such discrimination. See Resp. Br. 31-32, 35-38; State Br. 5, 15-19; Brief of Amicus Curiae Pennsylvania House of Representatives, Republican Caucus 7-13.

These arguments strain matters far past the breaking point. Read against the backdrop of the extensive fact-finding in which Congress engaged in the years leading up to the enactment of the 1967 statute, and the lessons Congress learned regarding the nature and underlying causes of age discrimination in employment, the 1974 amendments reflect an informed and considered legislative judgment that arbitrary and irrational age discrimination

ployment decisions of everything but merit," operate to "automatically remov[e] age as well as other improper classifications from the equation," *id.* at 21.



is a problem in the workplaces of state agencies just as it is in other workplaces.<sup>7</sup>

In its 1967 deliberations with respect to the ADEA, Congress found that arbitrary and unfounded stereotypes about the abilities of older workers are endemic in our society, and that these stereotypes lead to discrimination against those workers. *See* materials cited in Pet. Br. 28-32 and U.S. Br. 29-39. Although the legislation then before Congress was confined to the private sector, nothing in Congress' findings, or in the wealth of evidence on which they were based, suggested that the problem of age discrimination in employment was one deriving from the profit motive or from any other factor unique to private-sector employment. And when Congress turned its attention to the question whether the statute should be extended to the public sector, the Legislature determined that the "preconceived notions or myths" that result in discrimination against older workers in the private sector were at play in the public sector and with the same result. H.R. Rep. No. 93-913 (1974) at 40-41; S. Rep. No. 93-690 (1974) at 55-56. *See* Pet. Br. 31-32; U.S. Br. 36-38.

The States themselves apparently have made the same judgment. Respondents stress that "[v]irtually all" States have enacted statutes applicable to the State as employer which "permit monetary relief against the sovereign . . . [for] the same practices as the ADEA." Resp. Br. 2-3. This shows that the States are aware that those who conduct the business of the States as employers engage in "th[os]e same practices" to such an extent as to warrant remedial legislation.

<sup>7</sup> As Justice Powell noted in *Fullilove v. Klutznick*, 448 U.S. 448, 503 (1980) (Powell, J., concurring), "[o]ne appropriate source [of evidence for Congress] is the information and expertise that Congress requires in the consideration and enactment of earlier legislation."

Respondents' contention that the existence of these state statutes makes it all but impossible to "posit an instance of State conduct that violates equal protection," *id.* at 37, completely misses the mark. That state laws may prohibit the same conduct as the ADEA does not mean that state personnel officials will uniformly comply with those state laws, any more than they will universally comply with the ADEA itself.

And, unlike the case with the Due Process Clause, *see Florida Prepaid*, 119 S.Ct. at 2208, the existence of state remedies is irrelevant to the question whether the discriminatory acts of state officials are a proper subject of Equal Protection Clause enforcement legislation. "[L]egislation designed to deal with . . . discrimination [by state officials] is 'appropriate legislation' under [the Civil War Amendments, and it] makes no difference that the discrimination in question, if state action, is also violative of state law." *United States v. Raines*, 362 U.S. 17, 25 (1960). "[E]very state official, high and low, is bound by the Fourteenth and Fifteenth Amendments . . . [I]t follows from this that Congress has the power to provide for the correction of the constitutional violations of every such official without regard to the presence of other authority in the State that might possibly revise their actions." *Id.* *See generally Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982).

### C. The ADEA Is a Congruent and Proportional Means of Preventing and Remedying Unconstitutional Conduct

After much discussion of what Congress supposedly failed to recite or to find, respondents' brief finally turns to the ADEA's substance, arguing "above all else" that "it simply cannot be said that 'many of [the State employment actions] affected by the congressional enactment have a significant likelihood of being unconstitutional.'" Resp. Br. 40 (quoting *Florida Prepaid*, 119 S.Ct. at

2210) (in turn quoting *City of Boerne*, 521 U.S. at 532).<sup>8</sup>

Respondents' argument fails because it is based on a fundamental misconception of equal protection. The ADEA is crafted in measured terms to prevent and remedy arbitrary age discrimination in employment. See Pet. Br. 33-36, 42-44; U.S. Br. 40-49.<sup>9</sup> As a matter of the most basic

<sup>8</sup> Respondents make a passing assertion that the ADEA cannot qualify as "calibrated remedial legislation" because it "applies in equal measure to State and private employers," despite the "different economic and social pressures" and different "employment risks" in the two settings. Resp. Br. 39. That the "pressures" and "risks" of age discrimination may differ from one setting to another does not mean that the basic remedial scheme of the statute should vary. And, where relevant, Congress *did* tailor the application of the statute to public employment. See Pet. Br. 35 and n.21.

Nor do this Court's decisions suggest that an antidiscrimination statute like the ADEA must contain a sunset provision in order to be considered remedial. Age discrimination in government workplaces, no less than in other workplaces, is not some passing phase, and "§ 5 legislation [does not] require[] termination dates, geographic restrictions, or egregious predicates." *City of Boerne*, 521 U.S. at 533.

<sup>9</sup> Contrary to respondents' suggestion (Rep. Br. 43-44), in the ADEA Congress did not apply to claims of age discrimination the same statutory scheme as Title VII applies to claims of racial discrimination. To be sure, as "part of [the] ongoing congressional effort to eradicate discrimination in the workplace," *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 357 (1995), the ADEA contains some of the core provisions of the paradigm statute. But there are significant differences, including, among others, the ADEA's "reasonable factors other than age" defense, the special provisions applicable to benefit programs, and the defense for "bona fide occupational qualifications" (which, under Title VII, is available in cases involving religion, sex, or national origin, but not in cases involving race, see 42 U.S.C. § 2000e-2(e)). See Pet. Br. 34-35. Although respondents and their amici go to some lengths to minimize the importance of the BFOQ defense, that defense permits an employer (among other things) to rely on age as a proxy for relevant job qualifications where "some members of the . . . class [of older workers] possess a trait precluding safe and efficient job performance" and "it is 'impossible or highly impractical' to deal with the older employees on an individualized basis." *Western Air Lines*,

principle, that kind of governmental discrimination against individuals who are members of a certain class based on "inaccurate and stigmatizing stereotypes," *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993), about the class is an equal protection violation and is within Congress' Fourteenth Amendment § 5 power to prevent and remedy. See Pet. Br. 27-28.

Respondents' submission, in contrast, is that the Equal Protection Clause does not reach age discrimination in employment at all—that "it is difficult to imagine an act of age discrimination in employment that would rise to the level of a constitutional violation." Resp. Br. 26. See also *id.* at 25 ("government rarely if ever violates the Constitution by treating individuals differently on the basis of age"). That premise carries respondents to the conclusion that an age discrimination statute can pass the *City of Boerne* "proportionality" test only if the statute provides that every public-employer act of discrimination against an older worker can be justified by the generalization that physical and mental capacity sometimes diminish with age—no matter how inapt that generalization may be as applied to the particular act and the particular employee, and without regard to whether the generalization even was the actual basis for the challenged employment action. See Resp. Br. 40-42. At bottom, respondents' position is that a state agency *never* should be required to justify an age-based employment action "in a court of law," *id.* at 42—at least not unless the court will issue "an instruction to return a verdict in the defendant's favor," *id.* at 41. On respondents' theory, the only "proportional" age discrimination law would be one that permitted all age discrimination in public employment.

For this highly implausible concept of constitutionally protected age discrimination, respondents rely on cases in

*Inc. v. Criswell*, 472 U.S. 400, 414-15 (1985) (quoting *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 235 (5th Cir. 1976)).



which this Court has discussed the limits of judicial authority in passing on the constitutionality of legislation providing for mandatory retirement of certain categories of government personnel: *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976); *Vance v. Bradley*, 440 U.S. 93 (1979); and *Gregory v. Ashcroft*, 501 U.S. 452 (1991). See Resp. Br. 22-26. As we have explained, the Court's decisions, while recognizing that judicial deference is particularly appropriate in reviewing such legislation, by no means provide, even in that context, the blank check for age discrimination that respondents would read into them. See Pet. Br. 36-37; *Gault v. Garrison*, 569 F.2d 993 (7th Cir. 1977), *cert. denied*, 440 U.S. 945 (1979).

And, respondents simply ignore our showing, and that of the United States, that given the nature of the legal question presented, *Murgia*, *Vance* and *Gregory* do not undertake to define, much less to exhaust, the substantive content of the Equal Protection Clause.

What this means, first, is that this Court's holdings that a legislature may rely on broad generalizations about age when enacting certain legislation does not lead to the conclusion that a government employer may rely on the same type of generalization—stereotype, if you will—when making individual employment decisions. See Pet. Br. 37-39; U.S. Br. 43-44. This is not to say that “the protections of the Equal Protection Clause are any less when [a] classification is drawn by legislative mandate . . . than by administrative action,” *Nordlinger v. Hahn*, 505 U.S. 1, 16 n.8 (1992), cited in Resp. Br. 25. Rather, it is to say that what may be a rational classification for purposes of a governmental decision that is broad in scope and application, and that is made by a body (the legislature) that, by its institutional nature, deals in generalities, may not be rational for purposes of another decision that is narrower in scope and as to which individualized information is available to the decisionmaker. See Pet. Br. 37-39.

This is very much to the point here, because the general demise of mandatory retirement laws, see U.S. Br. 43-44—a development respondents acknowledge, Resp. Br. 37—means that “[t]he practice now challenged in most ADEA cases . . . is the unauthorized use of age as part of an ad hoc, individualized assessment by an employer.” U.S. Br. 44. See also *id.* at 47. None of the equal protection decisions of this Court on which respondents rely sanctions arbitrary age discrimination in decisionmaking of that nature.

*Murgia*, *Vance* and *Gregory* are indeed at a double remove. Those cases not only have to do with the limited judicial role in passing on legislation, but each turns as well on the even more limited judicial role in ascertaining social facts.

When this Court decided *Murgia*, it had before it no record to establish that, as a general proposition, “the aged . . . have . . . been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities,” 427 U.S. at 313, and no capacity to amass and assess such a record. It was largely for that reason that the *Murgia* Court concluded that older workers do not “constitute a suspect class for purposes of equal protection analysis.” *Id.* Congress, on the other hand, determined after years of study that discrimination against older workers is the result of arbitrary and invidious stereotypes. See Pet. Br. 28-30; U.S. Br. 29-39. By acting on “the evidence [thus] presented” to it, Resp. Br. 37,<sup>10</sup> Congress did not “utterly disrespect” this Court’s role, *id.*, nor did the Legislature seek to overturn this Court’s decision in *Murgia*. Unlike *City of Boerne*, where Congress overstepped its role by attempting to overrule a decision of this Court defining the substance of a con-

<sup>10</sup> Quoting House Select Comm. on Aging, 95th Cong., 1st Sess., *Mandatory Retirement: The Social and Human Cost of Forced Idleness* 38 (Comm. Print 1977).



stitutional right, *see* Pet. Br. 25-26, standards of judicial review such as the Court articulated in *Murgia* are rules for enforcing constitutional guarantees "*absent controlling congressional direction.*" *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985) (emphasis added). Congress shows no disrespect for the Court when it determines, after legislative study of a problem, that the authority available to the courts in the absence of legislation is insufficient to combat effectively a particular kind of arbitrary discrimination. In such a case, Congress has the power under § 5 to enact remedial legislation. *Murgia* and its progeny cannot be read to deny Congress that authority where age discrimination in employment is concerned.

#### CONCLUSION

The decision of the Court of Appeals should be reversed.

Respectfully submitted,

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IN THE SUPREME COURT  
OF THE UNITED STATES

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**J. DANIEL KIMEL, JR., et al.**  
*Petitioners*

v.

**STATE OF FLORIDA BOARD OF REGENTS, et al.**  
*Respondents*

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On Writ of Certiorari to the  
United States Court of Appeals  
for the Eleventh Circuit

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**BRIEF OF ENGLISH LANGUAGE  
ADVOCATES AS *AMICUS CURIAE* IN  
SUPPORT OF NEITHER PARTY**

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July 9, 1999

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### **QUESTION PRESENTED**

**Whether the Eleventh Amendment bars a private suit in federal court against a State for violation of the Age Discrimination in Employment Act or the Americans with Disabilities Act.**



#### INTEREST OF AMICUS CURIAE

English Language Advocates ("ELA")<sup>1</sup> is a non-profit advocacy organization dedicated to the preservation and promotion of a common language – English – in American political and governmental life. ELA is an unincorporated project of U.S., Inc., of Petoskey, Michigan, a non-profit charitable and educational corporation. ELA and its President, Robert D. Park, have been the principal advocates for "official English" policies before the federal courts, including in Nos. 95-974, *Arizonans for Official English and Robert D. Park v. Arizona* ("AOE I") and 98-167 ("AOE II"). Counsel for all parties have consented to the filing of this brief.

ELA's interest in this case stems from its concerns over challenges to policies of the twenty-five States which have declared English their official languages. Currently, for example, the Eleventh Circuit is considering *Sandoval v. Hagan*, 7 F. Supp. 2d 1234 (M.D. Ala. 1998)(federal regulations preclude Alabama's use of English-language drivers license exam), which involves Eleventh Amendment issues which might be affected by a decision in this case.

*Amicus* ELA takes no position on the Age Discrimination in Employment Act or Americans with Disabilities Act questions in this case, but writes solely to suggest to the Court that any relief not impinge on

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<sup>1</sup>Pursuant to Rule 37.6, *amicus* ELA certifies that no other person or entity made a monetary contribution to the preparation and submission of this brief, and that counsel for *amicus* wrote this brief without assistance from any other counsel.

other rights of the States protected by the Tenth Amendment (including a State's right to choose its own language for internal operations).

### SUMMARY OF ARGUMENT

A State's choice of which language to use in internal operations is a historically-based, protected "core function." Any federal abrogation of a language choice should be explicit and limited to remedial exercises of power. The decision in this case should not suggest otherwise.

### ARGUMENT

There are several areas of State sovereignty beyond the general reach of federal laws, including the regulation of a State's internal operations. "A State is entitled to order the processes of its own governance." *Alden v. Maine*, No. 98-436 (June 23, 1999), Slip Op. 42-43.

This is not a new thought, as this Court noted over a century ago: "To [the States] nearly the whole charge of interior regulations is committed or left." *Lane County v. Oregon*, 7 Wall. 71, 76 (1869); *Oregon v. Mitchell*, 400 U.S. 112, 126 (1970) (Black, J., joined by the Chief Justice and three other Justices) ("And the Equal Protection Clause of the Fourteenth Amendment was never intended to destroy the States' power to govern themselves, making the Nineteenth and Twenty-fourth Amendments superfluous.").

Under this Court's recent decisions, the Tenth Amendment protects the reservation of "original powers" of a State. *U.S. Term Limits v. Thornton*, 514

U.S. 779, 801 (1995); *Alden*, 29, quoting, *Nevada v. Hall*, 440 U.S. 410, 425 (1979).

A State's Tenth Amendment right to choose the language of its own internal operations is one of those historically-based core powers. Throughout American history, this Court has permitted States to use various languages. *Patterson v. De La Ronde*, 8 Wall. 292, 299-300 (1869) (Court reconciled French and English versions of Louisiana mortgage law); *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923) ("The power of the State to . . . make reasonable requirements for all schools, including a requirement that they shall give instructions in English, is not questioned."). And prior to the Constitutional Convention, the primacy of English was well-established. "[T]he English language dominated all public life. It was the only official language and as such was used in the courts, the assemblies, and the press." J.R. Pole, *Foundations of American Independence, 1763-1815*, 18 (1972).

Like the choice of location of its own State Capitol, the choice of language a State uses in conducting its affairs is a "function essential to [the State's] separate and independent existence." *Coyle v. Wyoming*, 221 U.S. 559, 595 (1911). Choice of language for internal State operations is thus an "original power," core State function over which federal abrogation power is limited. Any federal abrogation, therefore, must be explicit and remedial. *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, No. 98-531 (June 23, 1999), Slip Op. 11. There are few, if any, such abrogations. Yet at least one case suggests federal **regulations implicitly** require a State to provide services in languages other than English: *Sandoval v.*

*Hagan*, 7 F.Supp.2d 1234 (M.D. Alabama 1998)(striking English-language drivers license examinations as violating federal regulations), *on appeal*, No. 98-6598 (11<sup>th</sup> Cir., argued March 25, 1999).

A decision in this case which sweeps too broadly may inadvertently affect the lower courts' review of these language questions. For example, overly-broad language about congressional power to remedy unlawful discrimination might be misinterpreted as congressional authority to dilute States' immunity over its core language functions.

Any decision in this case, therefore, should not sweep so broadly as to suggest that Congress has exercised or delegated a power to abrogate States' Tenth Amendment rights to control the language of their own internal operations.

#### CONCLUSION

*Amicus* ELA, therefore, respectfully urges the Court not to expand federal power in a fashion which might affect *Sandoval* or other cases.

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No. 98-791

**IN THE  
SUPREME COURT OF THE UNITED STATES**

**UNITED STATES OF AMERICA, *Petitioner,***  
**AND**

**J. DANIEL KIMEL, JR, ET. AL.**

**v.**

**FLORIDA BOARD OF REGENTS, *Respondents.***

**UNITED STATES OF AMERICA, *Petitioner,***  
**AND**

**WELLINGTON N. DICKSON, A/K/A "DUKE"**

**v.**

**FLORIDA DEPARTMENT OF CORRECTIONS**

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**RODERICK MACPHERSON AND MARVIN NARZ**

**v.**

**UNIVERSITY OF MONTEVALLO**

**On Writ of Certiorari  
To The United States Court of Appeals  
For the Eleventh Circuit**

**BRIEF OF THE AARP; THE AMERICAN ASSOCIATION  
OF UNIVERSITY PROFESSORS (AAUP); ET AL.;  
AS AMICI CURIAE IN SUPPORT OF PETITIONERS**

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CENTER; THE NATIONAL EMPLOYMENT LAWYERS  
ASSOCIATION (NELA); NATIONAL PARTNERSHIP  
FOR WOMEN AND FAMILIES**

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On Writ of Certiorari  
To The United States Court of Appeals  
For the Eleventh Circuit

BRIEF *AMICI CURIAE*

INTEREST OF THE *AMICI CURIAE*<sup>1/</sup>

This *amici curiae* brief is submitted on behalf of AARP; the American Association of University Professors (AAUP); the American Federation of State, County and Municipal Employees (AFSCME); the Association of Trial Lawyers of America (ATLA); the Disability Rights

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<sup>1/</sup> This brief has been authored in its entirety by undersigned counsel for the *amici*. No person or entity, other than the named *amici* and their counsel, made any monetary contribution to the preparation or submission of this brief.

Education and Defense Fund, Inc. (DREDF); the Employment Law Center; the National Employment Lawyers Association (NELA) and the National Partnership for Women and Families. The statements of interest of *amici* are included in the appendix to this brief.

By written consent of the parties,<sup>2/</sup> *amici curiae* submit this brief in support of Petitioners.

### SUMMARY OF THE ARGUMENT

The Eleventh Amendment acts as a jurisdictional bar to private suits brought for damages against the States and state agencies under federal law. *Edelman v. Jordan*, 415 U.S. 651, 677-78 (1974); *Pennhurst State Sch. & Hosp. v. Halderman (Pennhurst II)*, 465 U.S. 89, 99 n.8 (1984). Eleventh Amendment immunity is not absolute, however. This Court has articulated a two-part test for determining if Congress has validly abrogated the States' immunity. First, Congress must make its intent to abrogate Eleventh Amendment immunity "unmistakably clear." *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989). Second, Congress must have acted "pursuant to a valid exercise of power" conferred by the Constitution. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55 (1996), quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985). In *Seminole Tribe*, this Court declared that only the Fourteenth Amendment provides Congress with the authority to abrogate Eleventh Amendment immunity. *Seminole Tribe*, 517 U.S. at 66.

Most recently, in *City of Boerne v. Flores*, 521 U.S. 507 (1997), this Court provided additional guidance for determining whether a statute is "appropriate legislation" under § 5 of the Fourteenth Amendment. In *City of Boerne*, the Court asserted that to be considered "appropriate legislation" under § 5, a statute must be "responsive to, or designed to prevent, unconstitutional behavior." *City of Boerne*, 521 U.S. at 532. In addition,

<sup>2/</sup> Letters of consent from all parties have been filed separately with the Clerk of the Court.

"[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 520.

The ADEA satisfies both of these conditions. First, by amending the ADEA on four separate occasions to either subject the States to liability, or to limit their liability under the Act in some way, Congress unequivocally expressed its intent to abrogate the States' sovereign immunity. Second, the objectives of the 1974 amendments to the ADEA, extending its prohibitions to the States, are wholly consistent with the guarantee of equal protection found in the Fourteenth Amendment. Congress' purpose in extending the ADEA's coverage to the States was to secure equal protection for state government employees by eliminating arbitrary and irrational age classifications and by mandating that state employees be judged based on their ability and not their age. This objective places the 1974 amendment to the ADEA squarely within the reach of the Fourteenth Amendment. Finally, in prohibiting arbitrary age discrimination, Congress narrowly tailored the ADEA to accommodate the unique concerns of the States.

### ARGUMENT

#### I. CONGRESS UNEQUIVOCALLY EXPRESSED ITS INTENT TO ABROGATE THE STATES' ELEVENTH AMENDMENT IMMUNITY IN THE TEXT OF THE ADEA.

"Congress' intent to abrogate the States' immunity from suit must be obvious from 'a clear legislative statement.'" *Seminole Tribe*, 517 U.S. at 55 (citing *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 786 (1991)). On four separate occasions, Congress has clearly and unmistakably expressed its intent to include the States as "employers" under the ADEA and to abrogate their immunity to liability under the Act. These congressional actions substantiate what this Court has already concluded – that "there is no doubt [that] the intent of Congress was[] to

extend the application of the ADEA to the States." *EEOC v. Wyoming*, 460 U.S. 226, 244 n.18 (1983).<sup>3/</sup>

As originally enacted, the ADEA protected only private sector employees. See Pub. L. No. 90-202, 81 Stat. 602 (1967). In 1974, Congress extended the protections of the ADEA to state and local government employees by amending the definition of "employer" to include "a State or political subdivision of a State or any agency or instrumentality of a State." Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28(a)(2), 88 Stat. 74 (amending 29 U.S.C. § 630(b)(2)), and by changing the definition of "employee" to include "employees subject to the civil service laws of a State government," *id.* § 28(a)(4), 88 Stat. 74 (amending 29 U.S.C. § 630(f)). As "employers" under the ADEA, state or local governments that "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age," 29 U.S.C. § 623(a)(1), are liable for legal and equitable relief. 29 U.S.C. §§ 626(b), (c). Thus, "the threshold fact of congressional authorization" to sue the State as employer is clearly present." *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452 (1976) quoting *Edelman v. Jordan*, 415 U.S. 651, 672 (1974).

In the 1986 amendments to the ADEA,<sup>4/</sup> Congress again made it unmistakably clear that it intends the ADEA to apply to the States. In addition to removing the ADEA's

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<sup>3/</sup> See also *Gregory v. Ashcroft*, 501 U.S. 452, 467 (1991) ("The ADEA plainly covers all state employees except those excluded by one of the exceptions."); *Pennsylvania Dep't of Corrections v. Yeskey*, 118 S. Ct. 1952, 1954 (1998) ("[T]he ADEA plainly covered state employees..." (dictum)).

<sup>4/</sup> Age Discrimination in Employment Act Amendments of 1986, Pub. L. No. 99-592, § 2(c), 100 Stat. 3342.

age cap,<sup>5/</sup> Congress carved out a narrow exception for firefighters and law enforcement officers employed by state and local governments. As to these employees, § 4(i) of the ADEA provided:

(i) It shall not be unlawful for an employer which is a state, a political subdivision of a state, or an interstate agency to fail or to refuse to hire or to discharge any individual because of such individual's age if such action is taken - (1) with respect to the employment of an individual as a firefighter or as a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable state or local law on March 3, 1983, and (2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this Act.

29 U.S.C. § 623(i) (emphasis added).<sup>6/</sup>

In 1990, Congress enacted the Older Workers Benefit Protection Act (OWBPA)<sup>7/</sup> to restore the ADEA's longstanding prohibition against arbitrary age

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<sup>5/</sup> As originally enacted, the ADEA only protected persons age 40 to 65. In 1978, the Act was amended to raise the age ceiling for nonfederal employees to age 70. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 2(c), 92 Stat. 189.

<sup>6/</sup> This exemption expired December 31, 1993. However, it was permanently reinstated three years later as part of the Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208 (1996) and recodified as § 4(j), 29 U.S.C. § 623(j).

<sup>7/</sup> Pub. L. 101-433, 104 Stat. 978 (1990).



discrimination in employee benefits.<sup>8/</sup> In the OWBPA, Congress twice spoke to the States as covered "employers" subject to liability for violations of the Act. First, "state and local political subdivisions" were afforded a two-year grace period to comply with the OWBPA if their benefit plans could "be modified only through a change in applicable State or local law." Pub. L. No. 101-433, § 105(c)(1). Second, any state or local government that had to establish a new disability plan in order to comply with the OWBPA was allowed to give its current employees the choice of remaining in the old plan or electing coverage under the new plan. *Id.*, § 105(c)(2). Expressing his support of these accommodations for the States, Senator Mitchell stated:

Under the [OWBPA], States will need to . . . adjust State employee benefit plans simply to comply with Federal law. The legislation does not preempt State authority to determine the scope or level of State employee benefits . . . The adjustment of State employee benefit plans is left entirely to the States, so long as unfair or arbitrary age discrimination does not occur relative to specific benefits or benefit plans . . . Senator Pryor and Senator Metzenbaum [sponsors of the compromise] have worked diligently to make every reasonable accommodation to State interests in this regard...

136 Cong. Rec. S13604-05 (Sept. 24, 1990).

As recently as 1996, Congress acknowledged the States as subject to the ADEA when it enacted legislation permanently reinstating the exemption that gives state and local governments the right to set mandatory retirement

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<sup>8/</sup> The OWBPA was enacted in response to *Public Employees Retirement Sys. of Ohio v. Betts*, 492 U.S. 158 (1989), which permitted employers to deny benefits based on age in certain circumstances. S. Rep. No. 101-263, at 5 (1990).

ages for their public safety officers.<sup>9/</sup> In sum, Congress has repeatedly demonstrated its clear and unequivocal intent to bring the States "within the core group of potential defendants in ADEA actions," *Cooper v. New York State Off. Of Mental Health*, 162 F.3d 770, 776 (2d Cir. 1998), not once, but four times. These "numerous references to the 'State' in the text of [the ADEA]," *Seminole Tribe*, 517 U.S. at 57, combined with sections 626(b)<sup>10/</sup> and (c)<sup>11/</sup> of the ADEA,<sup>12/</sup> "make it undubitable that Congress intended

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<sup>9/</sup> See *infra* note 6.

<sup>10/</sup> Section 626(b) of the ADEA incorporates the enforcement provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, by providing that the ADEA may "be enforced in accordance with the powers, remedies, and procedures provided in" 29 U.S.C. § 216(b). Section 216(b) states that an action "may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated," 29 U.S.C. § 216(b). A "public agency" is defined as "the government of a State and any agency of a State". 29 U.S.C. § 203(x).

<sup>11/</sup> Section 626(c) is the ADEA's private enforcement section that allows aggrieved persons to sue for damages, including back pay. "While it is true that § 626(c) is phrased in general terms - 'any person aggrieved' may sue in 'any court of competent jurisdiction' - the combination of the amendments to 'employer' and 'employee' and the availability of private damage actions makes it clear that States are intended to be subject to liability under § 626(c)." *Cooper v. New York State Off. of Mental Health*, 162 F.3d at 776.

<sup>12/</sup> Several federal circuit courts of appeals have found the ADEA's enforcement scheme, including its explicit incorporation of § 216(b) of the FLSA, to be "compelling evidence" of Congressional intent to abrogate the states' sovereign immunity. *Scott v. University of Miss.*, 148 F.3d 493, 500 (5th Cir. 1998). See also *Coger v. Board of Regents of the State of Tenn.*, 154 F.3d 296, 301 (6th Cir. 1998); *Hurd v. Pittsburgh State Univ.*, 109 F.3d 1540, 1544 n.3 (10th Cir. 1997) (the

(continued...)

through the Act to abrogate the States' sovereign immunity from suit." *Seminole Tribe*, 517 U.S. at 57. "Unless Congress had said in so many words that it was abrogating the states' sovereign immunity in age discrimination cases - and that degree of explicitness is not required, *Pennsylvania v. Union Gas Co.*, *Dellmuth v. Muth*, (dictum) -- it could not have made its desire to override the states' sovereign immunity clearer." *Davidson v. Bd. of Govs. of State Colleges and Univs.*, 920 F.2d 441, 443 (7th Cir. 1990).<sup>12/</sup>

<sup>12/</sup>(...continued)

enforcement provisions which the ADEA now references specifically authorize ADEA suits in federal court."). But see *Humenansky v. Regents of the Univ. of Minn.*, 152 F.3d 822, 824-25 (8th Cir. 1998); *Kimel v. State of Fla. Bd. of Regents*, 139 F.3d 1426, 1430-33 (11th Cir. 1998).

<sup>13/</sup> Eight out of ten of the federal circuit courts of appeals to have considered the issue concur that the ADEA clearly and unequivocally evidences Congress' intent to abrogate the States' immunity. See, e.g., *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694, 701 (1st Cir. 1983) ("the ADEA's express authorization for the maintenance of suits against state employers comprises adequate evidence to demonstrate congressional will that Eleventh Amendment immunity be abrogated."); *Cooper v. New York State Office of Mental Health*, 162 F.3d 770, 776 (2d Cir. 1998) ("In light of the explicit statements that States fall within the [ADEA]'s purview, Congress was 'unmistakably clear' in expressing its intent to abrogate state sovereign immunity."); *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 695 (3d Cir. 1996) ("The [ADEA] simply leaves no room to dispute whether states and state agencies are included among the class of potential defendants when sued under the ADEA for their actions as 'employers.'"); *Scott v. University of Miss.*, 148 F.3d 493, 499-501 (5th Cir. 1998); *Coger v. Board of Regents of the State of Tenn.*, 154 F.3d 296, 301-02 (6th Cir. 1998); *Goshdasby v. Board of Trustees of Univ. of Ill.*, 141 F.3d 761, 766 (7th Cir. 1998); *Keeton v. University of Nevada Sys.*, 150 F.3d 1055, 1057 (9th Cir. 1998); *Hurd v. Pittsburgh State Univ.*, 109 F.3d 1540, 1543-44 (10th Cir. 1997). But see *Humenansky v. Regents of the Univ. of* (continued...)

## II THE ADEA IS AN APPROPRIATE AND PROPORTIONAL EXERCISE OF CONGRESS' SECTION FIVE ENFORCEMENT POWER UNDER THE FOURTEENTH AMENDMENT.

### A. The ADEA Was Congress' Response to Pervasive and Arbitrary Age Discrimination Against Older Workers.

"Following *City of Boerne*, we must first identify the Fourteenth Amendment 'evil' or 'wrong' that Congress intended to remedy, guided by the principle that the propriety of any § 5 legislation 'must be judged with reference to the historical experience . . . it reflects'." *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 1999 WL 412723, \* 8 (U.S. June 23, 1999) (quoting *City of Boerne v. Flores*, 521 U.S. at 525). The underlying conduct at issue here is pervasive and arbitrary age discrimination by state employers.

In enacting the ADEA, Congress acted thoughtfully and circumspectly. "Efforts in Congress to prohibit arbitrary age discrimination date[d] back at least to the 1950's." *EEOC v. Wyoming*, 460 U.S. at 229. As part of the 1964 Civil Rights Act, Congress directed the Secretary of Labor to "make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected."<sup>14/</sup>

The Secretary's Report confirmed that age discrimination in employment was a pervasive and debilitating problem, particularly for those age 45 and

<sup>13/</sup>(...continued)

*Minn.*, 152 F.3d 822, 824-25 (8th Cir. 1998); *Kimel v. State of Fla. Bd. of Regents*, 139 F.3d 1426, 1430-33 (11th Cir. 1998).

<sup>14/</sup> Section 715 of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 265 (1964).



older.<sup>15/</sup> Specifically, the Report "found that a substantial amount of age discrimination in employment did exist and furthermore, that almost all of it was arbitrary."<sup>16/</sup> The most telling evidence of the problem was the widespread use of age limits in hiring, which denied workers jobs based on an arbitrary age limit regardless of ability.<sup>17/</sup> The Secretary advised Congress that legislation was needed to address the problem:

The use of [ ] age limits continues despite years of effort to reduce this type of discrimination through studies, information, and general education undertaken by the Federal Government and many States, as well as by nonprofit and employer and labor organizations. The possibility of new **nonstatutory** means of dealing with such arbitrary discrimination has been explored. That area is barren.

*The Older American Worker* at 21 (emphasis in original).

Subsequently, Congress and the Executive Branch initiated their own intensive investigation of the nature and extent of age discrimination, each holding extensive hearings on proposed legislation dealing with age discrimination in employment. See *EEOC v. Wyoming*, 460 U.S. at 230-31 (listing hearings). The "extensive fact finding undertaken by the Executive Branch and Congress,"

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<sup>15/</sup> Report of the Secretary of Labor, *The Older American Worker: Age Discrimination in Employment* (1965), reported in Legislative History of the Age Discrimination in Employment Act of 1967 (hereinafter "*The Older American Worker*").

<sup>16/</sup> 113 Cong. Rec. 31,254 (Nov. 6, 1967) (statement of Sen. Yarborough).

<sup>17/</sup> Approximately half of all private job openings explicitly barred applicants over age 55, and a quarter barred those over age 45. 113 Cong. Rec. 1089-90 (Jan. 23, 1967).

confirmed the findings of the Secretary of Labor. *Id.* In stark contrast to the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq.*, which this Court determined lacked modern examples of intentional discrimination, *City of Boerne*, 521 U.S. at 530, when the ADEA was enacted, "the evidence before Congress established that qualified workers were being fired, not hired, and paid less because of their age." *Goshtasby v. Board of Trustees of the Univ. of Ill.*, 141 F.3d 761, 771 (7th Cir. 1998); see also *Coger v. Board of Regents*, 154 F.3d 296, 304 (6th Cir. 1998).

The extensive record compiled in the ADEA's legislative history fully supports Congress' detailed findings of a serious and pervasive problem of arbitrary age discrimination against older workers. Specifically Congress found that:

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) **the setting of arbitrary age limits** regardless of potential for job performance **has become common practice**, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens



commerce and the free flow of goods in commerce.

29 U.S.C. § 621(a) (emphasis added). Only after determining that the establishment of "arbitrary age limits" had become "common practice" with devastating consequences for older workers, did Congress move forward with legislation.

The ADEA initially only applied to the private sector and did not address age discrimination by government employers.<sup>18/</sup> However, "[i]n 1973, a Senate Committee found this gap in coverage to be serious, and commented that '[t]here is . . . evidence that, like the corporate world, government managers also create an environment where young is somehow better than old.'" *EEOC v. Wyoming*, 460 U.S. at 233 quoting, *Improving the Age Discrimination Law: Hearing Before the Senate Comm. On Aging* 93d Cong., 1st Sess., 14 (1973). In response to this evidence, Congress extended the protections of the ADEA to federal, state, and local government employees "to shield public employees from the invidious effects of age-based discrimination." *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694, 699 (1st Cir. 1983). "Although the legislative history of the 1974 amendment is somewhat sparse, it evidences that 'Congress subsequently established that the[ ] same conditions [that begot the enactment of the ADEA in 1967] existed in the public sector.'" *Scott v. University of Miss.*, 148 F.3d 493, 502 (5th Cir. 1998) (quoting *Goshtasby v. Board of Trustees of the Univ. of Ill.*, 141 F.3d 761, 772 (7th Cir. 1998)).

Unlike the passage of the Patent Remedy Act, where "Congress identified no pattern of patent infringement by the States," *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 1999 WL 412723, at \*8 (U.S. June 23, 1999), when Congress extended the ADEA to the States, it was responding to:

<sup>18/</sup> See Pub. L. No. 90-202, 81 Stat. 602 (1967).

mounting evidence that employees of . . . State[s] . . . [were] being denied the free choice between productive work or adequate retirement income . . . [and] strong indications that the hiring and firing practices of government units discriminate against the elderly, frequently pressuring them into retiring before their productive days are over . . . [W]hatever the form, the pressures directed against older Government employees constitute flagrant examples of age discrimination in employment, and as such, they should be outlawed . . .

118 Cong. Rec. S7,745-46 (1972) (statement by Sen. Bentsen). Finally, while this Court considered the Patent Remedy Act to be Congress' "response to a handful of instances of state patent infringement," *Florida Prepaid*, 1999 WL 412723, at \*11, the States are frequent defendants in ADEA lawsuits,<sup>19/</sup> as evidenced by the significant number of cases raising the issue of the States' immunity to ADEA suits prior to the grant of *certiorari* in this case.

#### B. The Equal Protection Clause Protects Against Arbitrary Age Discrimination by the States.

The purpose of the Equal Protection Clause of the Fourteenth Amendment is "to secure every person within

<sup>19/</sup> Empirical studies directed at public sector employment also demonstrate that age discrimination by state and local governments remains a pervasive problem. See, e.g., I. Phillip Young, *et al.*, *Age Discrimination: Impact of Chronological Age and Perceived Position Demands on Teacher Screening Decisions*, 30 J. Res. & Dev. in Educ. 103, 111 (1997) ("these data indicate that age discrimination at the screening stage of the employment process exist[s] still within the public school setting"); Anne H. Hopkins, *Perceptions of Employment Discrimination in the Public Sector*, 40 Pub. Admin. Rev. 131, 132-133 (1980) (12 percent of all public employees, and 17 percent of public employees over 50 years old, reported age discrimination on the job).

the states' jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Sunday Lake Iron Co. v. Wakefield Township*, 247 U.S. 350, 352 (1918). This Court's "equal protection jurisprudence is not confined to traditional suspect or quasi-suspect classifications." *Goshtasby*, 141 F.3d at 771; *Coger*, 154 F.3d at 305; *Scott v. University of Miss.*, 148 F.3d 493, 500-501 (5th Cir. 1998). Classifications based on age, while only subject to rational basis review, *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976), are not beyond the scope of the Fourteenth Amendment. Nor are age classifications inherently improper subjects for legislation under Section 5 of the Fourteenth Amendment.

The rational basis standard, although deferential, is "not a toothless one." *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981). For example, in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), this Court, applying the rational basis test, invalidated a zoning ordinance as based upon "an irrational prejudice against the mentally retarded." 473 U.S. at 450.<sup>20/</sup> In *Cleburne*, this Court acknowledged that, "Our refusal to recognize the retarded as a quasi-suspect class does not leave them entirely unprotected from invidious discrimination . . . . The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction **arbitrary or irrational**." *Id.* at 446 (emphasis added). Since any legislation that distinguishes on the basis of age must be rationally related to a legitimate governmental purpose, the Equal Protection Clause clearly addresses age discrimination in employment. See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (*per curiam*); *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

<sup>20/</sup> See also *Zobel v. Williams*, 457 U.S. 55 (1982) (applying rational basis review to strike down a statutory scheme which provided for the distribution of income derived from the state's natural resources to adult citizens in different amounts, depending on the length of time each citizen had resided in the state).

"[A]rbitrary and irrational discrimination violates the Equal Protection Clause under even [this Court's] most deferential standard of review." *Bankers Life and Cas. Co. v. Crenshaw*, 486 U.S. 71, 83 (1988).

The purpose of the ADEA is "to prohibit **arbitrary** age discrimination in employment." 29 U.S.C. § 621(b) (emphasis added). Arbitrary age discrimination is not rational and therefore, violates the Fourteenth Amendment's Equal Protection Clause. As the ADEA is designed to remedy and to prevent arbitrary, i.e., irrational, employment decisions based on age, it enforces the provisions of the Fourteenth Amendment.<sup>21/</sup>

### C. The Objectives of the ADEA are the Essence of Equal Protection.

The legislative purpose of the ADEA and of its 1974 amendment are "the very essence of the guarantee of 'equal protection of the laws.'" *EEOC v. Elrod*, 674 F.2d 601, 604 (7th Cir. 1982). Congress' objective in both enacting the ADEA and extending its coverage to the States was to secure equal treatment for older employees based on their ability and not their age.

Title VII is the ADEA's closest legislative parallel. *Id.* at 607. The objectives of the ADEA and Title VII, which indisputably was passed pursuant to § 5 of the Fourteenth Amendment, are identical. Indeed, when Senator Bentsen, the sponsor of the legislation extending the ADEA to the States, first introduced his bill in 1972, he stated, "I believe that the principles underlying the [ ] provisions in the EEOC bill [extending Title VII's coverage

<sup>21/</sup> Because the ADEA was enacted pursuant to Congress' powers under § 5 of the Fourteenth Amendment, this Court's recent decision in *Alden v. Maine*, 1999 WL 412617 at \*31 (U.S. June 23, 1999) that Congress lacks the power under Article I to subject non consenting states to private suits in their own courts, should not impact the ADEA. *Id.* at \*32.



to federal, state and local employees] are directly applicable to the Age Discrimination in Employment Act." 118 Cong. Rec. 15,895 (1972).

On more than one occasion, this Court has recognized the shared goals of the ADEA, Title VII, and other employment discrimination statutes. "[T]he ADEA and Title VII share a common purpose, the elimination of discrimination in the workplace. . . ." *Oscar Meyer & Co. v. Evans*, 441 U.S. 750, 756 (1979).<sup>22/</sup> This Court has clearly expressed its conviction that the ADEA is an integral part of the nation's collective law prohibiting arbitrary employment discrimination:

The ADEA, enacted in 1967, as part of an ongoing congressional effort to eradicate discrimination in the workplace, reflects a societal condemnation of invidious bias in employment decisions. The ADEA is but part of a wider statutory scheme to protect employees in the workplace nationwide. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1988 ed. and Supp. V) (race, color, sex, national origin, and religion); the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* (1988 ed., Supp. V) (disability); the National Labor Relations Act, 29 U.S.C. § 158(a) (union activities); the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (sex).

*McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 357 (1995).

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<sup>22/</sup> See also *Lorillard v. Pons*, 434 U.S. 575, 584 (1978) ("There are important similarities between [Title VII and the ADEA], . . . both in their aims -- the elimination of discrimination from the workplace -- and in their substantive prohibitions. In fact, the prohibitions of the ADEA were derived *in haec verba* from Title VII.") and *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985).

Not only are the ADEA and Title VII themselves strikingly similar, the unlawful behaviors they are intended to combat are also identical. Congress obviously understood that age discrimination was similar to race and other forms of invidious discrimination. As justification for passage of the 1974 amendment, both the House and Senate committee reports specifically cite with approval President Nixon's statement recommending passage of the legislation:

Discrimination based on age -- what some people call "age-ism" -- can be as great an evil in our society as discrimination based on race or any other characteristic which ignores a person's unique status as an individual and treats him or her as members of some arbitrarily defined group.

H.R. Rep. No. 93-913, at 40 (1974); S. Rep. No. 93-690, at 55 (1974).<sup>23/</sup>

In the words of former congressman Claude Pepper, "Ageism is as odious as racism or sexism."<sup>24/</sup> Ageism<sup>25/</sup> violates the basic democratic principle that each person should be judged on the basis of individual merit rather than

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<sup>23/</sup> See also *EEOC v. Elrod*, 674 F.2d at 606. ("This view of congressional purpose is substantiated by the overall legislative history of the ADEA. Congress saw the original legislation, passed in 1967, as filling a gap in federal anti-discrimination law left open when Title VII was passed in 1964. Enactment of the ADEA thus completed the basic structure of federal protection of equal employment opportunity.").

<sup>24/</sup> 123 Cong. Rec. 27,121 (1977).

<sup>25/</sup> The term "ageism" describes the "deep and profound prejudice against the elderly which is found to some degree in all of us." F.N. Butler, *Why Survive?: Being Old in America* 11 (1975). Butler defines ageism as, "a process of systematic stereotyping of an discrimination against old people because they are old, just as racism and sexism accomplish this with skin color and gender." *Id.*, at 12.



on the basis of group characteristics.<sup>26/</sup> Age discrimination, like race discrimination and sex discrimination, results in unfair treatment on the basis of a characteristic -- one which the individual has neither chosen nor has the power to change.<sup>27/</sup> "The striking substantive similarity between the [ADEA and Title VII] militates strongly in favor of the conclusion that the identical reservoir of congressional power was the well-spring for both." *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d at 700.<sup>28/</sup>

**D. The ADEA is Narrowly Tailored to Accommodate the Special Concerns of State Employers.**

When Congress enacts legislation to enforce the provisions of the Fourteenth Amendment, "[t]here must be a congruence and proportionality between the injury to be prevented and remedied and the means adopted to that end." *City of Boerne*, 521 U.S. at 520. The ADEA clearly satisfies this standard as Congress carefully crafted the statute to address and remedy the serious problem of age

<sup>26/</sup> E.B. Palmore, *Ageism: Negative and Positive* 7 (1990).

<sup>27/</sup> H. Eglit, 3 *Age Discrimination* 1-4 (1986).

<sup>28/</sup> No significance can be drawn from the fact that the 1974 amendment to the ADEA was passed along with similar amendments to the FLSA. "[T]he connection of the ADEA amendment to the legislation enacting FLSA amendments was largely fortuitous." *EEOC v. Elrod*, 674 F.2d 601, 610 (7th Cir. 1982). As explained below, Title VII, not the FLSA is the ADEA's "closest legislative parallel." *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694, 700 (1st Cir. 1983); *EEOC v. Elrod*, 694 F.2d at 607. Although the ADEA is a "hybrid" of Title VII and the FLSA, the objectives and substantive prohibitions of the ADEA are nearly identical to Title VII's. Only the ADEA's enforcement procedures and remedies resemble those of the FLSA. See *Lorillard v. Pons*, 434 U.S. 575, 578-79 (1978). Given that the objectives of a statute are determinative in ascertaining whether it was a valid exercise of Congress's § 5 power, the fact that the ADEA was amended along with the FLSA in 1974 is not pertinent to this Court's determination.

discrimination in this country. Congress tailored the ADEA's legislative scheme to target arbitrary age discrimination while carving out exemptions for those instances where it is rational to make distinctions based on age.

First, "consistent with congressional findings that age discrimination especially affects older workers, [ ] § 621(a)(1)-(3)," *Migneault v. Peck*, 158 F.3d 1131, 1139 (10th Cir. 1998), the ADEA protects only individuals age 40 and over. 29 U.S.C. § 631(a). In contrast, at least nineteen of the state laws that prohibit age discrimination in employment either prohibit age discrimination against individuals age 18 or over or do not specify a minimum age for coverage.<sup>29/</sup> "Hence, the ADEA is remedial, . . . because its application is proportional to the conduct, arbitrary age discrimination among older workers, that it seeks to prevent." *Migneault*, 158 F.3d at 1139 citing *City of Boerne*, 521 U.S. at 519.

Second, the ADEA specifically permits any worker, regardless of age, to be fired or disciplined for good cause. See 29 U.S.C. § 623(f)(3).<sup>30/</sup> In addition:

in order to insure that employers were permitted to use neutral criteria not directly dependant on age, and in recognition of the fact that even criteria that are based on age are occasionally justified, the [ADEA] provided that certain otherwise prohibited employment practices would not be unlawful "where age is a bona fide occupational

<sup>29/</sup> Fair Employment Practices Manual, BNA Labor Relations Reporter, 451:58 - 60 (August, 1997).

<sup>30/</sup> Senator Yarborough, one of the sponsors of the bill which became the ADEA, declared, "This bill is to give [older workers] a fair chance, based on their qualifications. It does not give a person a preference because of age, it merely says that if they have equal qualifications, they will have equal treatment." 113 Cong. Rec. 35,056 (1967).

qualification reasonably necessary to the normal operation of the particular business [BFOQ], or where the differentiation is based on reasonable factors other than age." [RFOA] § 4(f)(1), 29 U.S.C. § 623(f)(1).

*EEOC v. Wyoming*, 460 U.S. at 233. There is rightfully no BFOQ for race in Title VII; nor is there a provision comparable to the ADEA's reasonable factor other than age (RFOA) provision in Title VII. The presence of these provisions in the ADEA demonstrates the deliberate steps Congress took to ensure that the ADEA was not too "sweeping." *City of Boerne*, 521 U.S. at 532.

In addition, unlike the RFRA, struck down in *City of Boerne*, the ADEA does not impose an onerous test for defending against an alleged violation.<sup>31/</sup> Instead, "the ADEA is narrowly drawn to protect older citizens from arbitrary and capricious action by the State." *Goshtasby*, 141 F.3d at 772; *Coger*, 154 F.3d at 307.

Under the *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), paradigm, after the plaintiff has established a *prima facie* case, the defendant need only assert a legitimate, non-discriminatory reason for its actions. The defendant's burden is one of mere articulation, of adducing evidence. The ultimate burden of persuasion rests with the plaintiff. *Saint Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993). A defendant's reason for terminating a plaintiff can be virtually any non-age discriminatory

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<sup>31/</sup> "The stringent test RFRA demands of state laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved. . . . Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law." *City of Boerne*, 521 U.S. at 533-534.

reason.<sup>32/</sup> If defendant articulates a legitimate, nondiscriminatory reason, plaintiff has to prove that the reason proffered is a pretext or not the true reason for the employment action. *Id.* The role of the jury is to weigh the credibility of the articulated reason for the employment action, not whether the reason itself is valid.

There is nothing onerous or intrusive about the utilization of the *McDonnell Douglas* paradigm to a state employer. It is not burdensome to ask a defendant state employer to state what nondiscriminatory reason motivated its employment action. In sum, "[t]he burden the ADEA places upon [the States] unlike RFRA or the Voting Rights Act, does not require 'searching judicial scrutiny,' but is more like a rationality test in forbidding discrimination on the arbitrary grounds of age." *Wichmann v. Board of Trustees of Southern Ill. Univ.*, 1999 WL 366742, at \*5 (7th Cir. June 7, 1999) citing *City of Boerne*, 521 U.S. at 534.

Finally, throughout the history of the ADEA, Congress has repeatedly addressed the unique concerns of the States and has taken steps to limit the ADEA's intrusion into state government. "[L]imitations of this kind tend to ensure Congress' means are proportionate to ends legitimate under § 5." *City of Boerne*, 521 U.S. at 533. For example, as explained above, state and local governments are permitted to establish maximum hiring and mandatory retirement ages for their public safety officers. 29 U.S.C. §

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<sup>32/</sup> See, e.g., *O'Connor v. DePaul Univ.*, 123 F.3d 665, 670 (7th Cir. 1997) ("For purposes of the ADEA, we may not be concerned with whether the decision was right or wrong, fair or unfair, well-considered or precipitous. We must look only at whether the reason was discriminatory. . . ."); *Kralman v. Illinois Dep't of Veterans' Affairs*, 23 F.3d 150, 156 (7th Cir. 1994) ("[n]o matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers, [the ADEA does] not interfere." quoting *Mechnig v. Sears, Roebuck & Co.*, 864 F.2d 1359, 1365 (7th Cir. 1988).

623 (j).<sup>33/</sup> In addition, "any person elected to public office in any State or political subdivision of any State by the qualified voters thereof" is excluded from the ADEA's coverage. 29 U.S.C. § 630(f). This statutory provision provides significant deference to, and protection of, the States' sovereign immunity.

When Congress enacted the OWBPA, it continued to exercise restraint in applying the ADEA's prohibitions to the States. First, although private employers, employment agencies, and labor organizations generally only had 180 days to come into compliance with the amended ADEA, Pub. L. 101-433, § 105(a), state and local governments were given an extra two years to comply with the OWBPA. *Id.*, § 105(c)(1). Second, any state that had to implement a new disability plan in order to comply with the OWBPA, was permitted to give current employees a choice between staying in the old plan and electing coverage under the new plan. *Id.*, § 105(c)(2). These provisions for state and local governments were added as part of a compromise to achieve bipartisan support and passage of the OWBPA. Senator Metzenbaum, one of the OWBPA's sponsors, stated that as a result of the compromise, "State governments are now expressing their view that we have fairly accommodated their concerns." 136 Cong. Rec. S13598 (Sept. 24, 1990).

In sum, as this Court has recognized, although the ADEA "requires the State[s] to achieve its goals in a more individualized and careful manner than would otherwise be the case, . . . it does not require the State[s] to abandon those goals, or to abandon the public policy decisions underlying them." *EEOC v. Wyoming*, 460 U.S. at 239.

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<sup>33/</sup> This privilege was allotted to the States despite the fact that a study commissioned by the Secretary of Labor and the Equal Employment Opportunity Commission (EEOC) concluded that "age is a poor predictor of individual capacity and limitation," and that "public safety is seldom at substantial risk from ineffective performance of the single public safety officer." F.J. Landy, *Alternatives to Chronological Age in Determining Standards of Suitability for Public Safety Jobs*, Executive Summary 13 (1992).

## CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that the judgment of the United States Court of Appeals for the Eleventh Circuit should be reversed. *Amici* urge this Court to rule that Congress abrogated the States' Eleventh Amendment immunity when it extended the ADEA's coverage to reach arbitrary and irrational age discrimination by state government employers.

Respectfully submitted,

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## **APPENDIX**

## APPENDIX

AARP is a nonprofit membership organization of persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. More than one-third of AARP's 33 million members are employed individuals, most of whom are protected by the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, (ADEA). One of AARP's primary objectives is to strive to achieve dignity and equality in the work place through positive attitudes, practices, and policies regarding work and retirement. In pursuit of this objective, AARP has, since 1985, has filed more than 180 *amicus curiae* briefs before this Court and the federal appellate and district courts. AARP has been a constant presence in cases presenting the issue of the constitutionality of the extension of the ADEA to the States. AARP filed *amicus curiae* briefs on this issue in *Cooper v. New York State Off. of Mental Health*, 162 F.3d 770 (2d Cir. 1998); *Young v. Pennsylvania House of Reps.* (stayed pending a decision in *Kimel*); *Scott v. University of Miss.*, 148 F.3d 493 (5<sup>th</sup> Cir. 1998); *Coger v. Board of Regents of the State of Tenn.*, 154 F.3d 296 (6<sup>th</sup> Cir. 1998); *Goshtasby v. Board of Trustees of the Univ. of Ill.*, 141 F.3d 761 (7<sup>th</sup> Cir. 1998); *Humenansky v. Regents of the Univ. of Minn.*, 152 F.3d 822 (8<sup>th</sup> Cir. 1998); *Migneault v. Peck*, 158 F.3d 1131 (10<sup>th</sup> Cir. 1998); and *MacPherson v. University of Montevallo*, 139 F.3d 1426 (11<sup>th</sup> Cir. 1998).

The American Association of University Professors (AAUP) is an organization of approximately 44,000 faculty members and research scholars in all academic disciplines. Founded in 1915, the Association is committed to the defense of academic freedom and the free exchange of ideas in scholarly and creative work. Among the organization's central functions is the development of policy standards for the protection of academic freedom, tenure, and other elements of higher education, including the ability of professors who work for state universities to seek judicial redress for civil rights violations, such as age discrimination. *See Leftwich v. Harris-Stowe College*, 702 F.2d 686 (8<sup>th</sup> Cir. 1983) (a case supported by AAUP that involved successful age discrimination suit by tenured professor when control of college was transferred from local to state entity); *see, e.g.,*

*On Discrimination*, AAUP Policy Documents & Reports (1995 ed.). AAUP's policies are widely respected and followed as models in American colleges and universities. See, e.g., *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 579 n. 17 (1972); *Tilton v. Richardson*, 403 U.S. 672, 681-82 (1971). AAUP is concerned that holding public entities, such as state universities, immune from the ADEA will impair the ability of professors to protect themselves from age discrimination in the workplace. See, e.g., *Kimel v. State of Florida*, 139 F.3d 1426 (11th Cir. 1998) (consolidating three ADEA cases, two of which involve professors); *Coger v. Board of Trustees of the State of Tennessee*, 154 F.3d 296 (6th Cir. 1998) (ADEA suit brought by 17 faculty members); *Board of Trustees of University of Connecticut v. Davis*, 162 F.3d 770 (2d Cir. 1998) (consolidating two ADEA cases, one of which involved three law school professors). Indeed, two of the three cases in this appeal involve state university professors.

The American Federation of State, County and Municipal Employees AFL-CIO (hereinafter "AFSCME") is a labor union consisting of over 1.3 million members. A large percentage of the AFSCME membership is employed by state governments. As the labor representative for these employees, AFSCME has a substantial interest in all matters related to the judicial enforcement of their ADEA rights.

The Association of Trial Lawyers of America (ATLA) is a voluntary national bar association. ATLA's approximately 50,000 member attorneys primarily represent plaintiffs in personal injury, civil rights and employment discrimination actions. ATLA has steadfastly supported the fundamental right to seek legal remedies in court as essential to preserving the rights of all Americans. The Court's decision in this case will affect ability of victims of age discrimination to obtain the legal redress that Congress clearly intended."

Disability Rights Education and Defense Fund, Inc. (DREDF) is a national law and policy center dedicated to

protecting and advancing the civil rights of people with disabilities, and securing equal citizenship for all people with disabilities. Founded in 1979, DREDF pursues its mission through education, advocacy and law reform work. Nationally recognized for its expertise in the interpretation of disability civil rights laws, since its founding DREDF has been involved in most disability rights cases heard by the U.S. Supreme Court, and in the legislative process leading up to all major pieces of federal disability rights legislation. In particular, DREDF played a central role in the legislative process leading to the enactment of the Americans with Disabilities Act (ADA).

The Employment Law Center ("ELC") is a project of the Legal Aid Society of San Francisco, a private, non-profit organization. The primary goal of the ELC is to improve the working lives of disadvantaged people. Since 1970, the Center has represented clients in cases covering a broad range of employment-related issues including discrimination on the basis of race, gender, age, disability, pregnancy and national origin.

The National Employment Lawyers Association (NELA) is a voluntary membership organization of more than 3,000 attorney members who regularly represent employees in labor, employment, and civil rights disputes. NELA is the country's only professional membership organization of lawyers who represent employees in discrimination, wrongful discharge, employee benefit, and other employment-related matters. As part of its advocacy efforts, NELA regularly supports precedent setting litigation affecting the rights of individuals in the workplace. NELA has filed numerous *amicus curiae* briefs before this Court and the federal appellate and district courts regarding the proper interpretation and application of employment discrimination laws to insure that the laws are fully enforced and that the rights of workers are fully protected. Some of the more recent cases before this Court involving age discrimination include *Oubre v. Entergy Operations, Inc.*, 117 S.Ct. 1466 (1998); *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S.Ct. 1307 (1996); *McKennon v.*



*Nashville Paper Publishing Co.*, 115 S.Ct. 879 (1995); and *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993). NELA members have brought numerous cases against states under the Age Discrimination in Employment Act (ADEA), and as such, has a compelling interest in ensuring that the goals of the ADEA are protected and fully realized.

The National Partnership for Women and Families (National Partnership) is a national advocacy organization that develops and promotes policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. Since its founding in 1971, the National Partnership (formerly the Women's Legal Defense Fund) has worked to advance the rights of women in the areas of work and family through litigation of significant cases, public education, and lobbying efforts. The National Partnership has long been concerned about the combined impact of age and gender discrimination, and has published a report, *Employment Discrimination Against Midlife and Older Women: How Do Sex-and-Age Cases Fare in Court?* In addition, the National Partnership led the Family and Medical Leave Coalition, a diverse coalition of more than 250 groups that supported enactment of the FMLA, and continues to monitor FMLA enforcement to ensure that the implementation of the Act is consonant with its purpose. The National Partnership participated as *amicus curiae* in several federal circuit court appeals on a question closely related to the question presented in the present case, to wit.: whether state employees can enjoy the protections of the Family and Medical Leave Act.

Supreme Court, U.S.  
**FILED**

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IN THE  
SUPREME COURT OF THE UNITED STATES

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DANIEL J. KIMEL, *et al.*, *Petitioners*,

vs.

FLORIDA BOARD OF REGENTS, *et al.*, *Respondents*.

---

UNITED STATES OF AMERICA, *Petitioner*,

vs.

FLORIDA BOARD OF REGENTS, *et al.*, *Respondents*.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE ELEVENTH CIRCUIT

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**BRIEF OF *AMICUS CURIAE* PENNSYLVANIA  
HOUSE OF REPRESENTATIVES,  
REPUBLICAN CAUCUS**

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## INTEREST OF *AMICUS CURIAE*

The Pennsylvania House of Representatives is one of the two houses of Pennsylvania's General Assembly. The Republican Caucus represents the majority of members of the Pennsylvania House of Representatives.\* The House is the appellant in *Young v. Pennsylvania House of Representatives, Republican Caucus*, No. 98-7130, in the United States Court of Appeals for the Third Circuit. That court has stayed its consideration of *Young* pending this Court's resolution of this case.

## SUMMARY OF ARGUMENT

When it amended the Age Discrimination in Employment Act ("ADEA")<sup>1</sup> in 1974 to add the States to the list of persons governed by it, Congress did not express an unmistakable intent to abrogate Eleventh-Amendment immunity.<sup>2</sup> The provision can be construed as imposing obligations on the States but limiting enforcement to cases brought by the United States, not by private plaintiffs.

Even if Congress intended to abrogate Eleventh-Amendment immunity when it amended the ADEA in 1974, it did not have the power to do so. Although Congress may not abrogate Eleventh-Amendment immunity through its Article I powers, Congress may

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\* No counsel for a party authored this brief in whole or in part, and no person or entity other than the named *amicus* made a monetary contribution to the preparation of this brief. Letters of consent are on file with the Clerk of Court.

<sup>1</sup> 29 U.S.C. §§ 621, *et seq.*

<sup>2</sup> *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996).



do so using its enforcement power under Section 5 of the Fourteenth Amendment. Congress may not use Section 5 to create substantive rights, but Congress may act to enforce the Fourteenth Amendment when there is either a pattern of constitutional violations by the States or a significant likelihood of such violations.<sup>3</sup>

There is no substantial evidence that the ADEA redresses constitutional violations committed by the States or that there is a significant likelihood of such violations. On the contrary, the States have taken legislative action on their own to bar age discrimination in public and private employment, sometimes long before the ADEA.

As a purported remedy, the detailed regulation of employment benefits imposed by the ADEA lacks proportionality to any putative violation of rights. The ADEA is also incongruous with Equal-Protection jurisprudence and with its own stated premise. Classifications based on age are afforded only a rational-basis review<sup>4</sup> and are presumed to be constitutional,<sup>5</sup> yet the ADEA shifts the presumptions and burdens in such a way as to prohibit constitutionally permissible state action. Furthermore, because the ADEA creates rights only for those within various, fluctuating age and income brackets, the ADEA is incongruous with its stated premise of assuring that employment is based on ability not on age.

<sup>3</sup> *City of Boerne v. Flores*, 117 S.Ct. 2157, 2164 (1997).

<sup>4</sup> *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976).

<sup>5</sup> *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

The ADEA really creates substantive economic rights, instead of protecting constitutional rights. It is an example of copycat federalization: Congress seizing popular ideas that originated in the States, without regard to whether they are within the limited powers delegated by the Constitution to the federal government. Applying the ADEA to the States is inconsistent with principles of federalism and undermines the ability of the States to tailor their laws to fit the needs and priorities of their citizens.

## ARGUMENT

### I. THE ADEA DOES NOT ABROGATE ELEVENTH-AMENDMENT IMMUNITY.

#### A. Congress did not express its intention to abrogate Eleventh-Amendment immunity with "unmistakable" clarity when it enacted the 1974 amendment to the ADEA.

For Congress to abrogate the Eleventh-Amendment immunity of the States, it must express its intent "in unmistakable language in the statute itself."<sup>6</sup> The language of the ADEA does not express an unmistakable intent to abrogate. Section 630 of the statute merely adds States to the list of employers it covers; it does not address immunity or the availability of private actions. Indeed, the language of Section 630 parallels the language in the Fair Labor Standards Act

<sup>6</sup> *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985); *Dellmuth v. Muth*, 491 U.S. 223, 231 (1989).

("FLSA")<sup>7</sup> prior to 1974 that was held inadequate to demonstrate an intent to abrogate.<sup>8</sup>

Petitioners and the United States argue that, because the ADEA incorporates certain enforcement provisions of the FLSA and because Congress amended the FLSA in 1974 in an attempt to abrogate immunity, the ADEA therefore abrogates immunity. However, it is not at all clear that the amended FLSA itself abrogates Eleventh-Amendment immunity.<sup>9</sup> Therefore, its incorporation into the ADEA is not the "unmistakable" indication Congress is required to offer. Moreover, the ADEA has its own remedy provision and its own conferral of jurisdiction on "any court of competent jurisdiction." The way to harmonize the two statutes is to read into the ADEA only those parts of the FLSA that do not overlap or negate existing provisions of the ADEA.<sup>10</sup>

Finally, the same Congress that amended the FLSA in response to *Employees* amended the ADEA to add the States to the list of covered employers, a device that failed to abrogate immunity in the previous version of the FLSA. Indeed, the two amendments were part of the same bill.<sup>11</sup> It is hard to find an "unmistakable" intent when, in the same bill, Congress added

<sup>7</sup> 29 U.S.C. §§ 201, *et seq.*

<sup>8</sup> *Employees of the Department of Health and Welfare v. Missouri Public Health Dept.*, 411 U.S. 279, 282, 83 (1973).

<sup>9</sup> See *Kimel v. State of Florida Board of Regents*, 139 F.3d 1426, 1432 n.11 (CA11 1998) (opinion of Edmondson, J.).

<sup>10</sup> *Mackey v. Lanier Collections Agency*, 486 U.S. 825, 837 (1988).

<sup>11</sup> Pub.L. 93-259 §§ 6(d)(1) and (2) (1974).

purportedly curative language to one statute and the old non-curative language to the other.<sup>12</sup>

**B. The ADEA could not be a valid exercise of Congress's power under the enforcement provision of the Fourteenth Amendment.**

The ADEA is a Commerce-Power enactment.<sup>13</sup> Because a Commerce-Power enactment cannot abrogate Eleventh-Amendment immunity, the question becomes whether the ADEA is also a Fourteenth-Amendment enactment. "[W]e should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment."<sup>14</sup> The ADEA does not express an intent to enforce the Fourteenth Amendment. The legislative findings that serve as the statute's preamble speak to commercial concerns rather than to those encompassed by the Fourteenth Amendment.

<sup>12</sup> The United States responds to this argument by suggesting that Congress did not amend the ADEA because it knew that the ADEA incorporated Section 216 of the FLSA and, so, only the FLSA required amendment. The problem with that argument is that, had Congress acted with such precision, it would not have amended the ADEA at all. The FLSA already provides that public agencies are proper defendants and, so, there would have been no point to amending Section 630 of the ADEA to include the States.

<sup>13</sup> *EEOC v. Wyoming*, 460 U.S. 226, 243 (1983).

<sup>14</sup> *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 16 (1981).

In *City of Boerne v. Flores*,<sup>15</sup> the Court delineated when statutes may be deemed properly enacted under the Fourteenth Amendment.

Congress' power under § 5 [of the Fourteenth Amendment], however, extends only to "enforc(ing)" the provisions of the Fourteenth Amendment. The Court has described this power as remedial....Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to define what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]." <sup>16</sup>

Put another way, Section 5 of the Fourteenth Amendment is not a license for Congress to impose whatever policies it might wish on the States; rather, it is a tool for Congress to remedy violations of existing constitutional rights.<sup>17</sup>

The 1974 amendment to the ADEA cannot pass constitutional muster as remedial legislation because it goes significantly beyond what the Court has held to be protected under the Fourteenth Amendment. "The Fourteenth Amendment was surely not intended to make every discrimination between groups of people a constitutional denial of equal protection."<sup>18</sup>

<sup>15</sup> 117 S.Ct. 2157 (1997).

<sup>16</sup> 117 S.Ct. at 2164 (citation omitted).

<sup>17</sup> 117 S.Ct. at 2163-64.

<sup>18</sup> *Oregon v. Mitchell*, 400 U.S. 112, 126-27 (1970).

1. **The extension of the ADEA to the States was not a proportionate response to a history of unconstitutional state actions.**

In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,<sup>19</sup> the Court said

We thus held [in *City of Boerne*] that for Congress to invoke § 5, it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and it must tailor its legislative scheme to remedying or preventing such conduct.<sup>20</sup>

In *City of Boerne*, the Court found a lack of such historic findings to support the Religious Freedom Restoration Act ("RFRA"), and, in *Florida Prepaid*, it found a lack of legislative history suggesting that Congress found a "pattern of patent infringement by the States, let alone a pattern of constitutional violations."<sup>21</sup>

The legislative history of the 1974 amendment of the ADEA that added States as covered employers likewise fails to reveal any pattern of age discrimination by the States. Indeed, the legislative history of the 1974 amendment makes no reference to a history of unconstitutional age discrimination by the States.<sup>22</sup>

<sup>19</sup> No. 98-531, 1999 WL 412723 (U.S. June 23, 1999).

<sup>20</sup> *Florida Prepaid*, 1999 WL 412723 at \*8.

<sup>21</sup> *Id.*

<sup>22</sup> See *Kimel*, 139 F.3d at 1448 (Opinion of Judge Cox).



In lieu of legislative history of the 1974 ADEA amendment, the United States cites a statement in 1972 by Sen. Lloyd Bentsen of Texas, in support of a proposal to extend the ADEA to state and local governments.

Mr. President, there is mounting evidence that employees of Federal, State, and local governments are being denied that free choice between productive work or adequate retirement income. In fact, there are strong indications that the hiring and firing practices of governmental units discriminate against the elderly, frequently pressuring them into retiring before their productive days are over.<sup>23</sup>

Sen. Bentsen described his "mounting evidence."

[R]ecent articles in the Wall Street Journal, the Washington Post, and the Washington Star, as well as case studies collected by the National Federation of Federal Employees, reveal that age discrimination practices are occurring at the Federal level. Letters from my own State have revealed that State and local governments have also been guilty of discrimination toward older employees.

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Elliott Carlson, writing in the Wall Street Journal on January 20, quotes a number of elderly federal employees who have been subject

<sup>23</sup> 118 Cong. Rec. 7745 (March 9, 1972) (statement of Sen. Bentsen).

to pressures as the result of recent "reduction in force" orders issued by Federal agencies.<sup>24</sup>

Sen. Bentsen's statement is merely an allusion to evidence, not evidence itself, and it was never scrutinized by the Congress that amended the ADEA. It is impossible to determine whether he was referring to *unconstitutional* discrimination. In any event his allusion is to age discrimination by the federal government and by the state and local governments in Texas.<sup>25</sup> Such "evidence" does not meet the standard enunciated in *City of Boerne*.<sup>26</sup>

The United States and Petitioners Kimel, *et al.*, attempt to demonstrate that Congress had before it sufficient evidence to support an exercise of Section-5 powers. However, they ignore the Court's admonition in *Florida Prepaid* that the legislative fact-finding must focus on violations of the constitution *by the States*. Instead, the United States and Petitioners Kimel, *et al.*,

<sup>24</sup> *Id.*

<sup>25</sup> The bill Sen. Bentsen introduced in 1972 was not enacted, a fact that supports the inference that Sen. Bentsen's colleagues did not find his evidence either convincing or comprehensive enough to warrant federal action. It debases the concept of legislative history to treat the Congressional Record like *Bartlett's Quotations*, extracting something said at some time to support any position.

<sup>26</sup> See *Florida Prepaid*, 1999 WL 412723 at \*11 ("The legislative record thus suggests that the Patent Remedy Act does not respond to a history of 'widespread and persisting deprivation of constitutional rights' of the sort Congress has faced in enacting proper prophylactic §5 legislation."). As noted below, by the time Sen. Bentsen made his statement, Pennsylvania had prohibited age discrimination against state employees for 17 years. See, *infra*, n.33.

point to the general legislative history of the ADEA, most of which regards private employers and is therefore, irrelevant to the Section-5 analysis.<sup>27</sup>

<sup>27</sup> Some of their references are either inapposite to the issue of state action or actually show the States in a good light. For example, both Petitioners Kimel, *et al.*, and the United States point to a Senate Committee Report in 1973 for the statement that "[t]here is also evidence that, like the corporate world, government managers also create an environment where young is somehow better than old." S. Rep. No. 846, 93d Cong., 2d Sess. 112 (1973). That portion of the report was addressing federal employees. The United States cites a statement by Rep. Steiger during the congressional debate in 1967 on the ADEA itself. However, debate seven years before enactment, by a wholly different Congress, is not legislative history. *Teamsters v. United States*, 431 U.S. 324, 354 n.39 (1977) ("It is the intent of the Congress that enacted [the section] that controls."). Moreover, a statement made in support of a measure that is rejected cannot be called legislative history of a later enactment; after all, the majority of the Congress that heard the endorsement in the end rejected the bill. In any event, the remarks demonstrate the opposite of what the United States suggests: Rep. Steiger was quoting testimony about a Wisconsin school board (not the State) that refused to renew the contract of a 51-year-old teacher. In a portion not noted by the United States, the testimony revealed that the Wisconsin Industrial Commission "bluntly ordered the school board to renew the teacher's contract...." 113 Cong. Rec. 34,742. The United States cites a statement by Rep. Donohue during the same 1967 debate. However, Rep. Donohue spoke only generally about "business, industry, and even the Government [feeling] that those citizens entering middle age are too old to begin any new employment." 113 Cong. Rec. 34,749. He offered no examples and his reference to "the Government" suggests federal, not state government. The result of the 1967 debate was the ADEA in its original form, which expressly exempted the States and their subdivisions. The United States likewise points to several statements in the

The second problem with the legislative "history" the United States has offered is that much of it is not "history" at all. Many of the references are from proceedings *after* the 1974 amendment to the ADEA.<sup>28</sup> Such "history" is irrelevant.<sup>29</sup> The Court will search the briefs of the United States and Petitioners Kimel, *et al.*, in vain for any example of age discrimination by the States that was identified by the Congress that considered the 1974 amendment to the ADEA.

The United States offers 1990s social science to fill the gap in legislative history. Even if such contemporary, non-legislative sources were relevant, they do not support the notion that the ADEA is a proper Fourteenth-Amendment enactment. One study cited by the United States in the Third Circuit (but not in this Court) found that

the customary justification for this body of law can no longer be applied, if it ever could, to all of the prohibitions against different forms of

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House of Representatives and the Senate during the 1964 debate on Title VII of the Civil Rights Act of 1964. Of course, Congress considered adding age as a protected class in Title VII and declined to do so. Finally, the United States refers to the statement of Sen. Sparkman during the 1964 debates and quotes him as announcing that "a person who is 40 or 45 years old finds it almost impossible to get a job, either in the Government or in private industry." 110 Cong. Rec. 9,912. Sen. Sparkman was referring to the *federal* government.

<sup>28</sup> See, e.g., Brief of the United States at 35-38, n.38-41.

<sup>29</sup> *Teamsters*, 431 U.S. at 354 n.39 (1977); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 758 (1979) (quotation omitted) ("We are not persuaded. Senate Report 95-493 was written 11 years after the ADEA was passed in 1967, and such legislative observations are in no sense part of the legislative history.").

discrimination. The ADEA, in particular, cannot be justified in terms of opening opportunities to a historically disfavored group. Those 40 years old or older are not politically powerless and do not, as a group, suffer from economic disadvantages. On the contrary, those who sue under the ADEA tend to be white males who are relatively well off in status, positions, and pay. It is therefore necessary to turn to other justifications for the ADEA. These have yet to be supplied, and if they are not, both the breadth of and the need for the ADEA must be reexamined.<sup>30</sup>

Thus, whether viewed at the time of its enactment in 1967, at the time of its amendment in 1974 or today,

<sup>30</sup> George Rutherglen, *From Race to Age: The Expanding Scope of Employment Discrimination Law*, 24 J. LEGAL STUD. 491, 521 (1995) (emphasis added). Professor Rutherglen collected statistics that show that 57 per cent of ADEA cases are brought by professional or managerial employees who are economically well-off white men. *Id.* at Table 1. Finally, Professor Rutherglen noted that "there is no evidence that older workers on the whole are worse off than younger workers, although the earnings of unskilled workers do tend to decrease before retirement." *Id.* at 499. A number of other researchers have reached the same conclusion. See, e.g., Pamela S. Krop, *Age Discrimination and the Disparate Impact Doctrine*, 34 STAN. L. REV. 837, 852 (1982) (citing U.S. Dept. of Labor, *The Older American Worker: Age Discrimination in Employment* 3 (1965)) ("Not only have older workers not suffered from lifelong discrimination, but any discrimination to which they are currently subject is not a product of invidious stereotypes and hatred, as with other types of discrimination.").

the ADEA cannot be viewed as a remedy for historic mistreatment of older Americans by state action.<sup>31</sup>

Even if the material offered in the opposing briefs could constitute sufficient evidence to support some congressional action, one could not reasonably view the ADEA as "carefully delimited remediation"<sup>32</sup> Like the RFRA struck down in *City of Boerne* and the patent provision at issue in *Florida Prepaid*, the ADEA purports to affect all States, at all levels, for an indefinite period of time. This expansive intrusion on state sovereignty cannot be justified as a remedy to any perceived constitutional wrong.

For example, Sen. Bentsen described age discrimination in the federal government and in his home State of Texas. He did not – and indeed could not – describe widespread age discrimination in other state governments. By 1955, for instance, the Pennsylvania General Assembly had enacted legislation that prohibited age discrimination and extended its

<sup>31</sup> Not only did Congress not *actually* find evidence of age discrimination in employment by the States, it could not have. A review of pre-1974 federal cases reveals virtually no Section-1983 suits based on age discrimination in employment.

<sup>32</sup> *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, No. 98-149, 1999 WL 412639 at \*5 (U.S. June 23, 1999) (citation omitted) ("We made clear in *City of Boerne v. Flores*, that the term 'enforce' is to be taken seriously – that the object of valid §5 legislation must be the carefully delimited remediation or prevention of constitutional violations.").



protection to state employees.<sup>33</sup> That law was, in fact, broader in its protections than the ADEA.

An examination of the contours of the ADEA's protections leaves one with the distinct impression that it was tailored not to prevent constitutional violations but to meet the vagaries of a changing political climate. One cannot reasonably conclude that the peculiar contours of the ADEA were designed with remediation in mind.

## 2. The extension of the ADEA to the States lacks congruity to the purported problem.

In *City of Boerne*, the Court said that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."<sup>34</sup> The ADEA lacks congruence for two reasons.

### a. Incongruous presumptions.

In *Massachusetts Bd. of Retirement v. Murgia*,<sup>35</sup> the Court held that "old age does not define a 'discrete and insular' group . . . in need of 'extraordinary protection from the majoritarian political process.'" Accordingly, the Court determined in *Murgia* that age

<sup>33</sup> 43 P.S. §§ 951, *et seq.* See, *infra*, n.54. Pennsylvania was not alone. A significant number of States prohibited age discrimination by public entities before 1974. See, e.g., 10 N.J.S.A. § 10:3-1 (New Jersey law prohibiting age discrimination in hiring state employees).

<sup>34</sup> 117 S.Ct. at 2169.

<sup>35</sup> 427 U.S. 307, 313 (1976) (quotation omitted).

classifications warrant only the least searching level of scrutiny, rational-basis review.<sup>36</sup>

Rational-basis is the level of review given to most state actions under the Equal Protection Clause. The rational-basis inquiry is a deferential one and, under it, courts must sustain state action unless the varying treatment of different groups or persons bears no rational relationship to any legitimate state purpose.<sup>37</sup>

This lower degree of scrutiny distinguishes age classification from typical forms of discrimination addressed in Fourteenth-Amendment-based remedial statutes. Title VII of the Civil Rights Act of 1964<sup>38</sup> proscribes discrimination based on "race, color, religion, sex, or national origin" — all categories that merit at least some form of heightened scrutiny.

One district court that found that the ADEA successfully abrogates immunity held that "[t]he particular standard applied by a court does not define the presence or absence of Fourteenth Amendment protection."<sup>39</sup> That statement is correct, but it misses the point. The question is not whether a particular group is to be afforded *any* Fourteenth-Amendment protection. Everyone is protected by it. The real question is, instead, whether Congress has an unlimited license to second-guess a State's rationally

<sup>36</sup> 427 U.S. at 313.

<sup>37</sup> *Frontiero v. Richardson*, 411 U.S. 677, 683 (1973).

<sup>38</sup> 42 U.S.C. §§ 2000e, *et seq.*

<sup>39</sup> *Young v. Pennsylvania House of Representatives, Republican Caucus*, 994 F. Supp. 282, 287 (M.D. Pa. 1998).

based non-suspect classifications by enacting broad-based "enforcement" legislation.<sup>40</sup>

In analyzing classifications meriting a rational-basis review, the Court has held that "[u]nless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions *presume* the constitutionality of the statutory discriminations. . ."<sup>41</sup>

In *City of Boerne*, the Court explained that "[p]reventative measures prohibiting certain types of laws may be appropriate *when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional*."<sup>42</sup> If classifications based on age are *presumed* to be constitutional, it is difficult to imagine that "many" of the state actions governed by the 1974 amendment to the ADEA have a "significant likelihood of being unconstitutional."<sup>43</sup> However, the ADEA overcomes the inconvenience of a lack of violations of

<sup>40</sup> — For example, the statute at issue in *City of Boerne* sought to enforce First-Amendment rights to free exercise of religion. There is no question that the general rights Congress sought to vindicate are protected by the First Amendment. The issues were (1) whether they were the proper subject of a Fourteenth-Amendment enforcement statute and (2) whether that statute was proportional to the wrong to be addressed. Had the Court based its analysis in *City of Boerne* on a foundation of whether free exercise of religion is in any sense constitutionally protected, it would inevitably have found the RFRA constitutional.

<sup>41</sup> *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (emphasis added).

<sup>42</sup> *City of Boerne*, 117 S.Ct. at 2170 (emphasis added).

<sup>43</sup> *Id.*

constitutional rights by creating statutory ones. The ADEA grants to a plaintiff who has made out a *prima facie* statutory case a presumption of "wrongful" (i.e., contrary-to-statute) discrimination.<sup>44</sup> There is an irreconcilable clash of presumptions.

Because of these conflicting presumptions, a plaintiff who sues only under Section 1983 would likely get a different result than an identical plaintiff suing under the ADEA. The ADEA is thus incongruous with any purported need to protect constitutional rights.

To open the Fourteenth-Amendment enforcement portal to classifications that receive only a rational-basis review would be effectively to remove any limitation. Practically all laws and government actions discriminate or classify in one sense or another.<sup>45</sup> Virtually any classification made by a State is afforded at least a rational-basis review.<sup>46</sup> Accordingly, a determination that rational-basis classifications can be undone by congressional mandates to the States would change what was intended to be merely an enforcement mechanism into general governmental power through which Congress could regulate almost all state action or legislation.

#### b. Incongruity with purposes.

The ADEA is incongruous with its own stated purposes, as well as with any purported enforcement of Fourteenth-Amendment rights. The purpose of the ADEA is "to promote employment of older persons

<sup>44</sup> See *Rabinovitz v. Pena*, 89 F.3d 482, 486 (CA7 1996).

<sup>45</sup> *Clements v. Fashing*, 457 U.S. 957, 968 (1982).

<sup>46</sup> *Dukes*, 427 U.S. at 302-3.

based on their ability rather than age; to prohibit arbitrary age discrimination in employment. . .<sup>47</sup> Yet the ADEA arbitrarily does not begin protecting workers until they reach 40. Police and firefighters have been both included and excluded and may be retired (sometimes) at 55.<sup>48</sup> An employee may be arbitrarily fired at 65, if the employee is an executive with a good pension.<sup>49</sup> Thus, under the ADEA, two 66-year-old women whose abilities are precisely alike can be treated differently by an employer if one is better-compensated than the other.

This incongruity with purpose is jarring when compared with other statutes. Title VII, for example, does not allow an affluent black person to be fired based on race. Even the designation of a protected age range is incongruous with Equal Protection. If Title VII borrowed the language of the segregationists and limited its protection to "persons of color, between quadroon and octoroon," we would all be outraged. Such a classification would mock the goal the statute purported to reach, yet the ADEA does exactly that.

As the Court noted in *Murgia*, the designation of age as a classification itself is awkward:

But even old age does not define a "discrete and insular" group in need of "extraordinary protection from the majoritarian political

<sup>47</sup> 29 U.S.C. §621(b).

<sup>48</sup> 29 U.S.C. § 623(j). Indeed, Section 623(j) includes several "grandfathering" provisions incongruous with Equal Protection.

<sup>49</sup> 29 U.S.C. § 631(c).

process." Instead, it marks a stage that each of us will reach if we live out our normal span.<sup>50</sup>

When the ADEA is viewed in its entirety, its incongruities are understandable. The ADEA is really a detailed regulation of employment and retirement benefits, not a genuine exercise of enforcement power under the Fourteenth Amendment.<sup>51</sup> It centralizes authority over another area that would normally be within the residual powers of the States.

## II. CONGRESSIONAL SECOND-GUESSING OF RATIONALLY-BASED STATE ACTIONS DESTROYS THE DUAL SOVEREIGNTY THAT BEST PROTECTS OUR LIBERTY.

The dual sovereignty that is the essence of our federalism requires the existence of States with a core competence that cannot be overridden or second-guessed and of a federal government that also enjoys supremacy in its sphere. This structure has played, and continues to play, an important role in safeguarding liberty. However, there is an opposing view of federalism that seems to place no value on the sovereignty of the States as a protection of liberty. Part II of Justice Breyer's dissent in *College Savings Bank*

<sup>50</sup> 427 U.S. at 313-14.

<sup>51</sup> See, e.g., 29 U.S.C. § 623(f) (permitting enforcement of otherwise prohibited acts "pursuant to the terms of a bona fide employee benefit plan . . ."); 29 U.S.C. § 623(i) (regulating employee benefit plans); 29 U.S.C. § 623(j) (regulating employment as firefighter or law-enforcement officer); 29 U.S.C. § 623(l) (permitting minimum age for vesting of retirement benefits and actuarial adjustments of benefits based on age).



views our federalism as one of changing doctrines but unchanging goals.

But those changing doctrines reflect one unchanging goal: the protection of liberty. Federalism helps to protect liberty not simply in our modern sense of helping the individual remain free of restraints imposed by a distant government, but more directly by promoting the sharing among citizens of governmental decisionmaking authority.<sup>52</sup>

While *Amicus* agrees that protecting liberty is the most important goal of federalism, *Amicus* respectfully submits that the dissent overlooks how dual sovereignty achieves it and offers an insecure and partial protection in its stead.

The form of "sharing" of decisionmaking authority favored by the dissent in *College Savings Bank* is at issue under the ADEA: the private right of action. However, the filing of lawsuits is not governmental decisionmaking. The plaintiff is a mere supplicant, constrained by burdens of proof and the limited remedies that the courts may afford.

In contrast, the States, much more so than the federal government, are really "promoting the sharing among citizens of governmental decisionmaking authority," by affording their citizens innumerable opportunities to exercise real governmental authority, both as public officers and as voters whose ballots have equal weight in state and local affairs. The

<sup>52</sup> *College Savings Bank*, 1999 WL 412639 at \*22 (Breyer, J., dissenting).

Commonwealth of Pennsylvania, for example, has more than 27,500 elected officials. Most of them are citizens who serve unpaid on school boards and municipal bodies. In addition to the elected officials, thousands more serve as appointees on state and local boards and commissions.

All the citizens of Pennsylvania share in this distribution of authority, because they choose each of their elected officials on a one-person-one-vote basis, including, since 1851, their judges. In contrast, not a single federal official is chosen on a one-person-one-vote basis.<sup>53</sup> Similarly, in the New England States, town-meeting government, in which each voter is a legislator, contrasts with the type of "town meeting" at which federal officials often hold court. Likewise, in States where the initiative and referendum exist, every voter is a lawmaker.

This widely spread and deeply rooted democracy continually gives birth to new policies and priorities, which often precede congressional awareness of the issues. For example, Pennsylvania's Fair Employment Practice Act<sup>54</sup> outlawed age discrimination in employment 12 years before the ADEA was first enacted and 19 years before Congress extended it to cover the States. By the time Congress acted, with other States also adding momentum, Congress

<sup>53</sup> See, *infra*, n.69.

<sup>54</sup> Act of October 27, 1955, No. 222, P.L. 744. This statute, binding the Commonwealth itself as well as other public and private employers, also banned employment discrimination on the basis of race, religion or ethnicity. The United States notes that at least 49 States have prohibited the use of age as a proxy for ability in most public employment decisions. Brief of the United States at 42 n.46.

undoubtedly saw political advantage in adding its voice to the chorus.

Congress often expropriates from the States ideas that have less to do with national affairs than with the famous dictum of one of its members that "all politics is local." But such copycat federalization, each time it occurs, enervates citizenship at the state and local levels a little bit more. When there can be a federal solution for every concern and a federal policy to trump every local distinction, the importance of being an active citizen in state and local affairs is diminished. Moreover, Congress often standardizes a compromised version of the original idea and stifles continued experimentation in the field. Instead of being its enabler and apologist, the Court should put bounds on the impulse of federal elected officials to try to be mayor, school board, governor, assemblyman and sheriff. In a system of dual sovereignty, there must be some ideas, no matter how good or popular they are, that cannot be usurped by the federal government, just as there are others that cannot be adopted by the States.

The "sharing" of authority through private rights of action is not a substitute for vigorous citizenship in the States as a protection of liberty. Private rights of action exist at the sufferance of Congress, which takes away as often as it gives.<sup>55</sup> Real liberty lies in rights

<sup>55</sup> Consider, for example, the wavering boundaries of the protected class in the ADEA itself, which changed in 1984 and 1986. In 1986 and 1989, Congress changed the definition of "normal retirement age" in the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(24). ERISA has also placed in doubt whether certain state-law rights of action are barred. 29 U.S.C. § 1144. The Price-Anderson Act

that cannot be taken away. The right of citizens to govern themselves in the States, using the "numerous and indefinite" powers reserved to them, is such a liberty.<sup>56</sup>

The liberty of being a citizen of a State with real, although shared, sovereignty results from the structure created by the Framers that divided power, not just among the branches of the federal government, but between the federal government and the States. This liberty seems a useless, duplicative burden to many in our complacent society, and a vestigial nuisance to many who wield federal power, but it is still, for the long run, an important buttress of democracy. As the Court explained in *Gregory v. Ashcroft*,<sup>57</sup>

[t]his federalist structure of joint sovereigns...assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

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of 1957, 42 U.S.C. §§ 2210, *et seq.*, set a limit of \$560 million in potential damages for any one nuclear accident and effectively displaced state-law remedies.

<sup>56</sup> *United States v. Lopez*, 514 U.S. 549, 552 (1995) (quoting THE FEDERALIST No. 45 at 292-293 (C. Rossiter ed. 1961)).

<sup>57</sup> 501 U.S. 452, 458 (1991).

[A] healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.<sup>58</sup>

If the States have sovereignty only at the sufferance of the federal government, a key safeguard of liberty is removed. To be a real safeguard, federalism has to be more than a one-way street, with Congress imposing obligations on the States and creating causes of action against them.<sup>59</sup>

<sup>58</sup> 501 U.S. at 452 (citations and quotations omitted).

<sup>59</sup> Although space does not permit a survey here, a comparison of our federalism with modern "federal" constitutions of other nations would show that the "states" in these countries are typically appendages of the central power, without sovereignty. Some well-known but "legal" breakdowns of democracy suggest the insufficiency of such centrist structures. Under the Weimar Constitution, a conservative federal Chancellor commandeered the liberal government of the state of Prussia; when he was succeeded by Hitler, the latter was able to appoint Goering Interior Minister of Prussia, with control over that state's large police force. See BULLOCK, *HITLER: A STUDY IN TYRANNY* at 177-178 and 220 (Bantam 1961) and WIEMARER REICHsverfassung, Artikel 48. Under the Indian Constitution, Indira Gandhi could replace state governors, have state legislatures prorogued and otherwise compel the states to act, helping to sustain her rule during a "state of emergency." See CONSTITUTION OF INDIA, Articles 156, 174, 248, 256, 257. While our democratic traditions seem secure at present, our constitutional structure of dual sovereignty is designed to preserve liberty no matter what conjunction of social upheaval and political ambition might occur in the future. Statutory private rights of action, as a protection of liberty, would evanesce in the heat of a real test of a constitution.

The dissent in *College Savings Bank* may have undervalued state sovereignty because it misread much of the history it invokes. The dissent said that "the Civil War effectively ended the claim of a State's right to nullify a federal law."<sup>60</sup> However, nullification did not precipitate the Southern rebellion.<sup>61</sup> From the perspective of *Amicus*, the true "states rights" issue before the war was that the slave States (while posturing as champions of states' rights) were using the organs of federal power to extend slavery into the free states, against the will of their citizens, and into federal territories.<sup>62</sup> Even Pennsylvania's efforts to prevent the kidnapping of her black citizens were stifled by federal power.<sup>63</sup> Pennsylvania did not invoke the nullification doctrine, despite these affronts to liberty. Nevertheless, the existence of a free state government was a focus for the political opposition to slavery and, through passive non-cooperation, at least a partial check on the enforcement of the Fugitive Slave Act.

The dissent in *College Savings Bank* also expressed the fear that state sovereign immunity "threatens the Nation's ability to enact economic legislation needed for the future in much the way that *Lochner v. New York* threatened the Nation's ability to

<sup>60</sup> *College Savings Bank*, 1999 WL 412639 at \*22 (Breyer, J., dissenting).

<sup>61</sup> The rebellion of the southern States occurred when, following the rise of the Republican Party and the election of Lincoln, they realized they would have neither the cooperation of the free States nor control over federal enforcement of the Fugitive Slave Act.

<sup>62</sup> See *Scott v. Sandford*, 19 How. (60 U.S.) 393 (1857) (the *Dred Scott* case).

<sup>63</sup> See *Prigg v. Pennsylvania*, 16 Pet. (41 U.S.) 539 (1842) (overturning Pennsylvania's Personal Liberty Law).



enact social legislation more than 90 years ago."<sup>64</sup> Again, from *Amicus*' point of view, *Lochner* was an exercise of federal power to suppress social initiatives that the States were undertaking internally. It was a limitation *by*, not *on*, the national government.<sup>65</sup> If the Court had respected state sovereignty in *Lochner*, the States could have enacted the social legislation that might have ameliorated the later consequences of the Great Depression. The state statute stuck down in *Lochner*, like the state statutes that preceded the ADEA, also stands in refutation of the contention that the States, without some federal leavening, would engage in a "race to the bottom" in health, safety and welfare legislation.<sup>66</sup>

The *College Savings Bank* dissent contended that "a federal court's ability to enforce its judgment against a State is no longer a major concern."<sup>67</sup> *Amicus* construes this to mean that the Court does not doubt its power to enforce a judgment against a State. However it is a major concern to a State for its impact on its treasury. The States bear a burden that comes with the doctrine that the general, residual powers of government are vested in them: the States must continually make difficult choices about allocating their limited resources across the entire spectrum of general government operations. Congress, with narrower

<sup>64</sup> *College Savings Bank*, 1999 WL 412639 at \*21 (Breyer, J., dissenting).

<sup>65</sup> *Hammer v. Dagenhart*, 247 U.S. 251 (1918), was the case that crippled Congress's power to condition the transport of goods and services across state lines on compliance with social welfare objectives.

<sup>66</sup> *College Savings Bank*, 1999 WL 412639 at \*22 (Breyer, J., dissenting).

<sup>67</sup> 1999 WL 412639 at \*23 (Breyer, J., dissenting).

responsibilities, has the luxury of ignoring the unglamorous but essential local services the States must provide. Inevitably some State programs will not receive the resources they could use to improve their performance. On any given day, Congress can pick a state program needing improvement (just as federal programs can be criticized in turn). But when Congress makes such selective demands, it is forcing a change of priority on the States. The sum of such changes can amount to a large-scale reordering of a State's budget, without necessarily achieving a net gain in service to the public.

No State should object to a forced change in priorities when Fourteenth-Amendment rights are being violated. However, when Congress is merely overriding the rationally-based classifications of the States to express its own preferences, the Court should not defer to it.

The United States argues that the Court should defer to congressional judgment in this area because judicial review is anti-democratic, but congressional judgments are not.<sup>68</sup> The United States is right to appeal to principles of democracy, but wrong in its implicit assumption that deference on the basis of these principles should be given to Congress rather than to the legislatures of the States. Congress is not established on a one-person-one-vote basis.<sup>69</sup> The

<sup>68</sup> Brief of the United States at 23.

<sup>69</sup> Based on the 1990 U.S. Census and the distribution by State of seats in the U.S. House of Representatives, there are large disparities in representation in the House. The congressional district with the largest population is 176 per cent the size of the district with the smallest population. Although congressional districts within each State are equal

governments of the States are. The exercise of the general powers of government should be founded on the one-person-one-vote principle.<sup>70</sup> Our national government, which is not and cannot be based on that principle, must limit itself to the "few and defined" powers that the constitutional compromise confers on it. Not the least of its delegated powers is its power to enforce the Fourteenth Amendment.

However, if Congressional enforcement power is construed into a plenary grant of authority over the States, then, together with an expansive reading of the Commerce Clause, the federal government will acquire a general police power over all persons and entities. It will become "a parliament of the whole people, subject

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in population, nationally the deviation from the average ranges from 20 per cent less to 40 per cent more. The U.S. Senate, of course, is not representative of population. For example, senators representing less than five per cent of the American people constitute 26 per cent of the voting power of the Senate. The election of a president is skewed by the reflection of these disparities in the Electoral College. These representational disparities are increasing as population shifts: according to the first census, in 1790 the largest State was only about 12 times more populous than the smallest State, but in 1990 our largest State was 65 times more populous than our smallest.

<sup>70</sup> See *Reynolds v. Sims*, 377 U.S. 533, 556 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise").

to no restrictions save such as are self-imposed."<sup>71</sup> The States, in turn, will "be relegated to the role of mere provinces or political corporations."<sup>72</sup>

No one should relish such an outcome, because such a national general government would lack a principled foundation in one-person-one-vote representation for assuming such power. Moreover, because the States would still be the constitutionally-defined constituencies from which federal officials are elected, smaller States and congressional districts could justifiably be regarded by the larger ones as "rotten boroughs" because of overrepresentation in the general government. Under the British constitution, Parliament was able to ameliorate the inequities of representation by passing Reform Bills. Our Constitution does not allow such remedy.

On democratic principles, then, the judgment of each State as to rationally-based classifications should be given deference over that of Congress. These democratic principles are supported by common sense and experience.<sup>73</sup> Although as a nation we have many common interests, the States continue to have differences and unique perspectives. Pennsylvania, for example, has the nation's second oldest population, as well as the fifth largest city and largest rural population. Pennsylvania has established a Department,

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<sup>71</sup> *South Dakota v. Dole*, 483 U.S. 203, 217 (O'Connor, J., dissenting) (quoting *United States v. Butler*, 297 U.S. 1, 78 (1936)).

<sup>72</sup> See *Alden v. Maine*, No. 98-436, 1999 WL 412617, at \*2247 (U.S. June 23, 1999).

<sup>73</sup> See *Sims*, 377 U.S. at 564-65 ("State legislatures are, historically, the fountainhead of representative government in this country.").

of Aging to administer a variety of programs for older citizens in its unique mix of urban and rural settings.<sup>74</sup> If Congress can impose its will on the Commonwealth under the ADEA, Congress could in theory override everything Pennsylvania has done in its programs on aging.<sup>75</sup> Yet a one-size federal program that covered Montana as well as Pennsylvania would undoubtedly fit neither very well. Congress could even, on the principles espoused in the brief of the United States, amend the ADEA to override the minimum ages in state constitutions for holding public office. However, the Fourteenth Amendment does not give Congress plenary power to restructure the governments that the citizens of each State have established for themselves.<sup>76</sup>

## CONCLUSION

The Pennsylvania House of Representatives, Republican Caucus, respectfully requests that the Court affirm the decision of the Eleventh Circuit.

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AUGUST 17, 1999

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<sup>74</sup> See 71 P.S. § 581-1 *et seq.*

<sup>75</sup> For example, could Congress modify or prohibit Pennsylvania's state-lottery-funded subsidy of public transportation for persons 65 and older? See 72 P.S. § 3761-2. Could Congress extend it, at the State's expense, to those older than 40 or insist that it be narrowed to have an income cap on eligibility, *a la* the ADEA? Could Congress change these parameters from year to year, as it has in the ADEA, at the behest of national lobbying groups? On the principles espoused by the brief of the United States, Congress could do so, with serious fiscal impact on the Commonwealth.

<sup>76</sup> *Oregon v. Mitchell*, 400 U.S. 112 (1970).



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J. DANIEL KIMEL, JR., et al.,  
*Petitioners,*

v.

STATE OF FLORIDA BOARD OF REGENTS, et al.,  
*Respondents.*

UNITED STATES OF AMERICA,  
*Petitioner,*

v.

FLORIDA BOARD OF REGENTS, et al.,  
*Respondents.*

ON WRITS OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

**BRIEF OF AMICI CURIAE STATES OF  
OHIO AND TENNESSEE AND  
CONNECTICUT, DELAWARE, GEORGIA,  
HAWAII, IDAHO, KANSAS, LOUISIANA,  
MAINE, MICHIGAN, MISSISSIPPI, MONTANA,  
NEBRASKA, NEVADA, NEW JERSEY,  
OKLAHOMA, OREGON, RHODE ISLAND,  
UTAH, VERMONT AND THE  
COMMONWEALTHS OF PENNSYLVANIA  
AND VIRGINIA IN SUPPORT OF RESPONDENTS**

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## STATEMENT OF *AMICI* INTEREST

The States of Ohio, Tennessee and 21 other *amici* States urge the Court to affirm the judgment below. In doing so, they join both Florida and Alabama in this case, as well as at least two other states—New Mexico and New York—that have independently asked the Court to similarly protect the States’ immunity. See *Migneault v. Peck*, 158 F.3d 1131 (10<sup>th</sup> Cir. 1998), petition for cert. pending, No. 98-1178; *Cooper v. New York State Office of Mental Health*, 162 F.3d 770 (2d Cir. 1998), petition for cert. pending, No. 98-1524. At issue is whether the States’ Eleventh Amendment immunity from money-damages suits was abrogated when Congress enacted the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §621, *et seq.* Subsumed in the issue are two questions: whether Congress *expressed* an unmistakably clear intent to abrogate the States’ immunity, and if so, whether it had the *power* to do so under Section 5 of the Fourteenth Amendment.

As this Court reaffirmed just this past Term, under our federalist Constitution the States “retain ‘a residuary and inviolable sovereignty,’” and are “not relegated to the role of mere provinces or political corporations.” *Alden v. Maine*, 119 S.Ct. 2240, 2247 (1999). As sovereigns, the States have a vital interest in ordering their own affairs—particularly their management of the internal machinery of State governments—without the undue interference of being haled into federal court and forced to explain, at great cost, each and every employment decision they make.

The States share many concerns about such ADEA suits generally, and about the type of ADEA suits at issue here in particular, for reasons of both purse and principle. At the most concrete level, the States face considerable costs in defending these cases, even if they win, along with the potential and actual costs of damages and attorney fees if they lose. But more importantly, the States seek to ensure

that their constitutional sovereign immunity is overridden by Congress only when Congress truly acts to remedy constitutional violations *by the States*. The States’ unique status as sovereigns is not honored if Congress may override States’ immunity by pointing to alleged constitutional violations by private or non-State governmental actors—yet that is all that the relevant legislative record shows here.

In defending their sovereign immunity against one aspect of the ADEA—money-damages suits in federal court—the States emphatically do not question the ADEA itself, nor its goal of eradicating age discrimination. To the contrary, the States have been leaders, not followers, in protecting their own employees, as well as citizens in the private sector, from age discrimination. Indeed, it is in part because States have actively prevented, rather than committed, age discrimination that Congressional abrogation is unwarranted here. But if the States are to continue to act as laboratories of democracy, as they did when many preceded the federal government in outlawing age discrimination, and as they continue to do in everything from education to welfare reform, they must not be hamstrung by the threat of suit whenever they act, but must instead maintain the flexibility that attends their sovereignty.

All of this ultimately furthers the transcendent goal of federalism, reflecting our national belief that individual liberty is most effectively secured by dividing the country into federal and State governments, each with well-preserved and separate sovereign powers. In the interest of preventing the dilution of these critical principles, the *amici* States submit this brief for the Court’s consideration.



## SUMMARY OF ARGUMENT

The ADEA does not contain an unmistakably clear, unequivocal and textual expression of congressional intent to abrogate the States' Eleventh Amendment immunity. Because the States are powerless to correct judicial misapprehensions of Congress's intent to abrogate, strict enforcement of the so-called "clear-statement" rule is essential to safeguard the States' constitutionally secured immunity from suit in federal court. The States therefore respectfully urge this Court to reject petitioners' invitation to relax the standards of clarity and specificity required by such cases as *Dellmuth v. Muth*, 491 U.S. 223 (1989), *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985), and *Employees of the Dep't of Public Health & Welfare v. Missouri*, 411 U.S. 279 (1973).

None of the statutory provisions from which petitioners would have this Court divine an intent to abrogate are sufficiently explicit under these prior cases. First, Congress's 1974 decision to subject the States to the substantive provisions of the ADEA does not supply the required clear statement. Although Congress expanded the ADEA's definition of "employer" to include the States at that time, Congress neither inserted the word "employer" into 29 U.S.C. §626(c), which is the source of the right to bring a private enforcement action under the ADEA, nor otherwise amended the Act to address, even indirectly, the topic of the States' sovereign immunity.

Petitioner's reliance upon the ADEA's cross reference to §216(b) of the Fair Labor Standards Act of 1938 ("FLSA") (29 U.S.C. §216(b)) is similarly unavailing. Under this Court's clear statement jurisprudence, the required expression of an intent to abrogate must appear "in the statute itself" (*Atascadero State Hosp.*, 473 U.S. at 243), in other

words, within the provisions of the ADEA. Congressional intent to alter through abrogation the fundamental balance of our federal system should not be inferred from a mere reference to the terms of another, wholly separate and distinct, statutory scheme. Moreover, even if the words of §216(b) of the FLSA are read verbatim into the ADEA, as petitioners insist they must be, those words subject employers to private actions in federal court only for violations of the FLSA's minimum wage and hour and retaliatory discharge provisions. The language of §216(b) does not subject State employers (or any other category of employer for that matter) to suit in federal court for violations of the ADEA.

Nor did Congress have the power to abrogate the States' Eleventh Amendment immunity. Congress can abrogate only to remedy unconstitutional State action, so Congress must first identify a predicate "pattern of constitutional violations" by the States. *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S.Ct. 2199, 2206-07 (1999). But the legislative history--both in 1967 when Congress enacted the ADEA and in 1974 when Congress added State employees to its coverage--contains not a single identified violation, let alone a pattern. The 1967 record shows evidence of private sector age discrimination, but does not show any State discrimination. Quite to the contrary, the record shows that States led the way in protecting their own employees, as well as private sector employees, from age discrimination. Indeed, the federal government looked to the States as a model in enacting the ADEA.

Congress extended ADEA coverage to the States on perhaps several different bases, but none of those bases involved age discrimination by States. The stated basis for applying the ADEA to States was that it was a "logical

extension" of Congress's decision to extend economic legislation—the Fair Labor Standards Act—to the States. Congress did review evidence of governmental age discrimination—but that concerned *federal*, not State, discrimination. And Congress apparently had a general notion that public and private employees should enjoy the same standards of protection. But none of these concerns raise the specter of unconstitutional age discrimination.

Even if a minimal predicate were presumed, the ADEA's restrictions on the States go far beyond guaranteeing constitutional protections. The ADEA subjects State employment decisions to exacting scrutiny, prohibiting a wide sweep of policy choices that are undoubtedly constitutional. The narrow exception ADEA offers for "bona fide occupational qualifications" is much more demanding than the constitutional rational basis test that would otherwise apply. And ADEA suits intrude on more than strictly employment decisions, as almost any policy choice can be alleged to have a "disparate impact" on older employees — such as the Florida Board of Regents' choice here to allow State universities flexibility in spending their budgets. This suit is just one example of the broad and deep reach of the ADEA.

Because Congress had neither the power nor the express intent to abrogate state sovereign immunity when it passed the ADEA, the Eleventh Amendment bars this suit, and the judgment below should be affirmed.

### ARGUMENT

The States' sovereign immunity is essential to our federalist system of government, and as such, it should not be—and cannot be, under the Court's plain rules—abrogated

lightly. Several principles help to cabin Congress' power to abrogate the States' immunity, and to guide the Court in not too easily inferring abrogation. Applying these principles shows that in extending the coverage of the ADEA to cover States as employers, Congress neither expressed the intent nor had the power to abrogate the States' sovereign immunity.

### I. THE ADEA DOES NOT CONTAIN AN UNMISTAKABLY CLEAR, TEXTUAL EXPRESSION OF AN INTENT TO ABROGATE THE STATES' ELEVENTH AMENDMENT IMMUNITY.

This Court should decline petitioners' invitation to retreat from its historical insistence upon an "unmistakably clear" (*Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)), "unequivocal and textual" (*Dellmuth v. Muth*, 491 U.S. 223, 230 (1989)) expression of congressional intent to abrogate the States' Eleventh Amendment immunity "in the statute itself." *Atascadero State Hosp.*, 473 U.S. at 243. The "clear-statement" rule is more than a mere "rule of construction," as the United States would have it. Brief for the United States ("U.S. Br.") at 12. Rather, its strict observance by Congress and vigilant enforcement by the federal courts are essential to protect from inadvertent encroachment "the States' constitutionally secured immunity from suit in federal court." *Atascadero State Hosp.*, 473 U.S. at 242. The rule has the salutary effect of directly focusing Congress's attention on "the vital role of the doctrine of sovereign immunity in our federal system" (*Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89, 99 (1984)) before it undertakes to alter "the fundamental constitutional balance between the Federal Government and the States" through abrogation. *Atascadero State Hosp.*, 473 U.S. at 238. At the same time, the rule protects the States against "judicial



misapprehension of that abrogation," which the States "are unable directly to remedy." *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990). The burden of compliance for Congress is negligible<sup>1</sup>, while the dangers to state sovereignty threatened by any relaxation of the clear-statement requirement are substantial.

Petitioners urge this Court to discover in the ADEA an intent to abrogate, not from any unmistakably clear language to that effect in the text itself, but rather (1) based upon a chain of inferences that may be drawn from the interplay between two provisions of the statute (29 U.S.C. §§ 626(c) and 630(b)); and (2) based upon a reference contained in a third provision of the ADEA (29 U.S.C. §626(b)) to an entirely different statute (29 U.S.C. §216(b)). Neither route leads to its desired destination.

1. First, petitioners focus on the 1974 amendment to the ADEA, which expanded the definition of "employer" to include "a State or political subdivision of a State and any agency or instrumentality of a State." 29 U.S.C. §630(b). Petitioners further note that, since its original enactment in 1967, the ADEA has afforded to persons aggrieved by a violation of the Act the right to sue in federal court for redress: "Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal and equitable relief as will effectuate the purposes of this chapter . . . ." 29 U.S.C. §626(c). When the two

<sup>1</sup>See, e.g., *Florida Prepaid*, 119 S.Ct. at 2203 (1999), quoting 35 U.S.C. §296(a) ("Any State . . . shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in federal court . . . for infringement of a patent.")

provisions are considered in tandem, petitioners reason, it must necessarily follow that the 1974 amendment supplied a clear statement of congressional intent to subject the States to suits by private persons in federal court for violations of the ADEA: "In extending the ADEA to the States in 1974, therefore, Congress placed States as employers squarely within an existing enforcement scheme that specifically and expressly contemplated suits by employees against employers in federal court." U.S. Br. at 14.

The expanded definition of "employer," even when read together with §626(c), falls far short of the standard of clarity demanded by this Court's prior cases. The basic flaw in petitioners' reasoning is that the word "employer" nowhere appears in §626(c). It cannot be disputed that §626(c) has from the beginning conferred a right to bring a civil action in federal court for redress of grievances under the ADEA. And, given the subject matter of the ADEA, it may be assumed that, when Congress enacted §626(c) in 1967, "employers" were the intended target of the suits contemplated by that provision. But, when Congress amended the definition of "employer" in 1974 to include the States, it neither amended §626(c) to insert the word "employer" nor made any other change in the text of the ADEA to address, even indirectly, the subject of the States' sovereign immunity. While it no doubt may be inferred from the 1974 decision to subject the States to the substantive requirements of the ADEA that Congress may also have supposed that States too could now be sued under §626(c), the fact remains that Congress nowhere made a statement to that effect in the text. While Congress need not use particular "magic words" to exercise its powers of abrogation, this Court has traditionally required an explicit, textual statement of some description in order to override the protections of the Eleventh Amendment. "[A] permissible inference, whatever its logical force," cannot qualify as "the



unequivocal declaration which . . . is necessary before [this Court] will determine that Congress intended to exercise its powers of abrogation." *Dellmuth*, 491 U.S. at 232 (emphasis supplied).

Indeed, §626(c) of the ADEA would still fall short of the clarity required by this Court's prior decisions, even if it expressly authorized suit against an "employer." That is the teaching of *Employees of the Dep't of Public Health & Welfare v. Missouri*, 411 U.S. 279 (1973). In *Missouri*, as here, the definition of "employer" in the Fair Labor Standards Act of 1938 had originally excluded the States, but the statute was later amended to cover certain state hospitals and related institutions. In contrast to the ADEA, however, the statutory scheme involved in *Missouri* expressly rendered an "employer" liable to an "employee" for violations of the statute and authorized actions "to recover *such* liability" in courts of competent jurisdiction. 411 U.S. at 283 (emphasis supplied). While, based on these provisions, this Court harbored "no doubt that Congress desired to bring under the Act employees of hospitals and related institutions" of the States, the Court nevertheless held that the statutory scheme was insufficiently explicit to "lift the sovereign immunity of the States" from private enforcement actions in federal court. 411 U.S. at 285.<sup>2</sup>

2. Nor does the immediately preceding subsection of the ADEA—29 U.S.C. §626(b)—supply the

<sup>2</sup>See also *Atascadero State Hosp.*, 473 U.S. at 242-47 (provisions of the Rehabilitation Act of 1973 authorizing suit against "any recipient of Federal assistance," coupled with implementing regulations expressly defining the class of recipients to include the States, constitute insufficient expression of intent to abrogate).

unequivocal expression of an intent to abrogate plainly lacking in the text of §626(c). Petitioners wish to find that expression through §626(b)'s reference to §216 of the Fair Labor Standards Act of 1938 ("FLSA"):

The provisions of this chapter [the ADEA] shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 . . . , and 217 of this title, and subsection (c) of this section.

29 U.S.C. §626(b) (emphasis supplied). In turn, §216(b) of title 29 provides, in pertinent part:

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and payment of wages lost and an additional equal amount as liquidated damages. *An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for*

and in behalf of himself or themselves and other employees similarly situated . . . .

29 U.S.C. §216(b) (emphasis supplied). Because §216(b) of the FLSA expressly authorizes suits against "any employer (including a public agency) in any Federal . . . court . . . ,"<sup>3</sup> petitioners argue that the ADEA's reference in §626(b) to §216 provides the clear statement they seek of Congress's intent to authorize private suits under the ADEA against State employers in federal court.

But the argument wholly ignores the requirement that effective language of abrogation must appear "in the statute itself." *Atascadero State Hosp.*, 473 U.S. at 243. The language upon which petitioners rely appears in the FLSA, not in the ADEA. This Court has never suggested that a mere reference in one statute to a provision in another can qualify as an unmistakable expression in the text of the former of congressional intent to abrogate the States' immunity from suit under that statute. As this Court has cautioned, Congress should not be presumed to have undertaken the serious business of abrogation—an action that disturbs "the fundamental balance between the Federal Government and the States"—by dropping "coy hints" of its intention to do so. *Dellmuth*, 491 U.S. at 231.

It is no answer to this objection that §626(b)'s reference to §216 may be said to "incorporate" that section of the FLSA verbatim into the ADEA. By its express terms, §216(b) authorizes actions "against any employer (including

<sup>3</sup>"Public agency" is elsewhere defined in the FLSA to include "the government of a State or political subdivision thereof" and "any agency of . . . a State, or a political subdivision of a State . . ." 29 U.S.C. §203(x).

a public agency)" *only* "to recover the liability prescribed in either of the preceding sentences" of §216. Those two "preceding sentences" create employer liability for violations of the minimum wage and hour provisions of the FLSA (29 U.S.C. §§206, 207) and for violations of the FLSA's retaliatory discharge prohibition (29 U.S.C. §215(a)(3)). Those two sentences do not prescribe any liability for violations of the ADEA.

Thus, the very words of §216(b) from which petitioners seek to construct their "clear statement" belie any claim that §626(b)'s incorporation of them has subjected the States to private enforcement actions in federal court under the ADEA. If §626(b)'s reference to §216 "makes [§216(b)] as much a part of [the ADEA] as though it had been incorporated at full length" (U.S. Br. at 15 n. 15, *quoting Engel v. Davenport*, 271 U.S. 33, 38 (1926)), then every word of §216(b), not just a selective abridgement thereof, must be considered. The words chosen by Congress—all of the words—are indeed quite clear, and none of them authorizes suit against State employers (or against any other employer for that matter) for violations of the ADEA. The source of the private right of action under the ADEA is §626(c), and, as set forth above, §626(c) does not contain any clear statement of congressional intent to abrogate the States' Eleventh Amendment immunity.

## II. THE ADEA IS NOT APPROPRIATE REMEDIAL LEGISLATION UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT

Congress is empowered by Section 5 of the Fourteenth Amendment to "enforce, by appropriate legislation, the provisions" of the Amendment. In a word—*enforce*—Congress's power was limited even as it was being broadened. Thus, Congress's remedial power to

enforce constitutional rights, which is broad, has always been distinguished from the power to *define* those rights, which is fully beyond Congress's reach. *Florida Prepaid*, 119 S.Ct. at 2202; *City of Boerne v. Flores*, 521 U.S. 507, 517 (1997); *Civil Rights Cases*, 109 U.S. 3 (1883). As the Court explained in *City of Boerne*:

*Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]."*

*City of Boerne*, 521 U.S. at 519 (emphasis supplied). Even where Congress steers clear of redefining rights, but acts solely to enforce them, its enforcement power is limited by Section 5 to enacting only *appropriate* legislation.

First, the remedial power is triggered only by *factual evidence* of a pattern of constitutional violations: Congress "must identify conduct transgressing the Fourteenth Amendment's substantive provisions." *Florida Prepaid*, 119 S.Ct. at 2207; *City of Boerne*, 521 U.S. at 530-31; *EEOC v. Wyoming*, 460 U.S. 226, 260 (1983) ("Congress may act only where a violation lurks")(Burger, C.J., dissenting). The Court properly defers to Congress' ability to evaluate the facts it finds, but such deference does not relieve Congress of the duty to find *facts*: anecdotes and assertions of protecting "constitutional values" are not enough. See *City of Boerne*, 521 U.S. at 530-31 (dismissing anecdotes); compare H.R. Rep. No. 88, 103<sup>rd</sup> Cong., 1<sup>st</sup> Sess., at 9 (1993) (RFRA's proponents claimed that Section 5 authorized Congress "to provide statutory protection for a constitutional *value* when

the Supreme Court had been unwilling to assert its authority") (emphasis supplied). Moreover, those facts must constitute a pattern, not an instance or two, see *Florida Prepaid*, 119 S.Ct. at 2207, and those facts must involve truly *constitutional* violations, not perfectly constitutional acts that Congress might seek to outlaw. *City of Boerne*, 521 U.S. at 530-31 (emphasis of RFRA hearings was on laws that met constitutional standards).

Second, even when Congress may act to remedy violations, it is not given a blank check, but must act in proportion to the wrongs it finds: Congress "must tailor its legislative scheme to remedying or preventing such conduct." *Florida Prepaid*, 119 S.Ct. at 2207; *City of Boerne*, 521 U.S. at 520. ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end"). This tailoring rule, rooted in Section 5's limit of "appropriate legislation," is as time-honored as it is essential to holding the line between enforcing and defining rights. See *Civil Rights Cases*, 109 U.S. 3, 13 (1883) (Section 5 legislation must "be adapted to the mischief and wrong which the Amendment was intended to provide against"); *City of Boerne*, 117 S. Ct. at 2164 (requiring "congruence and proportionality"). If no tailoring were required, the enforcement-only limitation would have no meaning, as a Congress that failed to find violations in one area could simply point to any slight violation in another field to justify power over both areas and more.

The extension of the ADEA to the States fails on both counts. No constitutional violations precipitated the extension, and the strictures of the Act go far beyond anything required by the Constitution.



**A. Congress Found No Evidence Of Unconstitutional Age Discrimination By The States When It Extended The ADEA To Cover State Employment In 1974.**

1. The ADEA was not enacted nor extended to the States, to remedy unconstitutional age discrimination. When Congress passed the ADEA in 1967, it applied only to private sector employment; and State, local, and federal employees were all excluded. The legislation was preceded by extensive hearings and reports regarding the prevalence of age discrimination in the private sector. See *EEOC v. Wyoming*, 460 U.S. at 229-33. But in all of these investigations, it seems that there was not a *single* mention of States as employers at all, let alone as discriminatory ones.

By contrast, the federal government looked to the States, which had already paved the way in outlawing age discrimination in employment, for advice and as models of how to best implement antidiscrimination policies. See *The Older American Worker: Age Discrimination in Employment* (1965) (Labor Report), reprinted in *Equal Employment Opportunity Comm'n (EEOC), Legislative History of the Age Discrimination in Employment Act 16-41* (1981), at 9-10 ("As part of the preparation for this report, a conference of State administrators of age discrimination laws was convened by the Secretary of Labor, in September 1964, to see their views on the effectiveness of such legislation.") The Secretary of Labor's 1965 report devoted a section to State laws, entitled with the observation that "[a]rbitrary age discrimination is significantly reduced in States which have strong laws, actively administered, directed against discrimination based on age." *Id.* at 9. Almost half of the States had such laws at the time, with some dating back

decades earlier and most covering private and State employees alike. *Id.*; see, e.g., N.J. Stat. §52:14-11 (1938); R.I. Gen. Laws 28-6-1 (1956). The Secretary praised both the intent and the effectiveness of such State laws, noting as a drawback not the States' intent or commitment, but that limited resources prevented States from doing more, demonstrating why federal action was needed. *The Older American Worker* at 10.

2. Years later, Congress still had not identified any unconstitutional State discrimination when it extended ADEA coverage to include federal, State, and local employees as part of the Fair Labor Standards Act ("FLSA") Amendments of 1974. The bulk of the hearings and reports on the bill concerned the FLSA provisions, governing minimum wage, overtime pay, and the like. The ADEA itself had been modeled on the FLSA in 1967, and the consensus was that the ADEA amendment was "a logical extension of the committee's decision to extend FLSA coverage to Federal, State, and local employees." S. Rep. No. 690, 93d Cong., 2d Sess. 55 (1974); H.R. Rep. No. 913, 93d Cong., 2d Sess. 40 (1974) (same).

The legislative record on this ADEA amendment is sparse, and the little there is demonstrates that not only was there no evidence of State constitutional violations, but also that neither State action (unconstitutional or not) nor constitutional violations (by States or others) was a focus of Congress' attention. One apparent focus of Congress' attention, and perhaps a prime impetus for Congress' actions, was Congress' recognition that the *federal government* itself did not practice what it preached regarding age discrimination. In introducing the original standalone bill in 1972, Senator Bentsen cited several examples of federal government discrimination: "there is very disturbing evidence to suggest that the *Federal Government* . . . may be

a leading offender in applying pressure tactics to coerce older workers to retire at an early age." 118 Cong. Rec. 7745 (1972) (emphasis supplied). *See also* S. Rep. No. 93-846, at 112 (1974) (finding that in federal government employment, "older employee[s] had been singled out for reduction-in-force action; that the emphasis on early retirement placed an unequal burden on middle-aged workers; and in certain training programs youth is emphasized in determining eligibility"). As to the federal government, Senator Bentsen relied on more than just anecdotes or rhetoric, citing a recent committee report on federal government practices. *Id.*, citing Senate Special Comm. On Aging, 92d Cong., 2d Sess., *Cancelled Careers: The Impact of Reduction-in-Force Policies on Middle-Aged Federal Employees* ("Comm. Print 1972"); *see also* Senate Special Comm. On Aging, 93d Cong., 1<sup>st</sup> Sess., *Improving the Age Discrimination Law* (Comm. Print 1973).

In all of the committee reports, hearings, and other records leading up to 1974 amendments, the sole mentions of State age discrimination were some cursory comments by Senator Bensten. Introducing his bill in 1972, Senator Bensten began by asserting "mounting evidence that employees of Federal, State and local governments" experience discrimination, but he went on to discuss *federal* discrimination at length. He mentioned States only one more time, commenting that "[l]etters from my own State have revealed that State and local governments have also been guilty of discrimination toward older employees." 118 Cong. Rec. 7745 (1972). In the 1974 floor debate, Senator Bensten again cited "letters from State and local employees." *See* Legislative History of the Fair Labor Standards Amendments of 1974, Senate Committee on Labor and Public Welfare (Comm. Print 1976) Vol. II at 1955 (floor debate on S. 2747, Mar. 7, 1974). Aside from these comments—and even assuming the "letters" comments to reflect evidence—the

record is bereft not only of another shred of *evidence* of any State age discrimination, let alone a constitutional problem, but the record also lacks even another rhetorical assertion of such a problem.<sup>4</sup>

On this "record," then, it should be safe to say that in "enacting the [ADEA amendments], Congress identified no pattern of [age discrimination] by the States, let alone a pattern of constitutional violations." *See Florida Prepaid*, slip op. at 2207. Indeed, despite any superficial notion that age discrimination is closer to equal protection concerns than the Patent Remedy Act is to due process, the ADEA record here stands on even weaker ground than did the Patent Remedy Act. Congress did not identify even *two* examples of State age discrimination, *cf. id.*, nor even hold up one extended example of a State employee alleging discrimination. *Cf. id.* at \*15 (Stevens, J. dissenting) (noting specific testimony about the patent case of Marian Chew). And surely an unspecified reference to constituent letters carries no more weight than the anecdotes rejected in both *Florida Prepaid* and *City of Boerne*. *Florida Prepaid*, 119 S.Ct. at 2207; *City of Boerne*, 521 U.S. at 532.

The legislative record not only fails to reveal evidence of violations by States, but it also fails to demonstrate that Congress was concerned with *constitutional*

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<sup>4</sup> As in 1967, the legislative record from 1967-1974 does not mention the State as employers, but the record notes the growing number of States that outlawed age discrimination—including in State employment—before the 1974 amendments were passed. *See* 118 Cong. Rec. 7745 (1972) (Sen. Bentsen); Secretary of Labor, *Age Discrimination In Employment Act of 1967* (1972) (annual report) at 6, 18-29 (Table 7); *See* Appendix A.



violations at all. To be sure, Senator Bentsen did once invoke "the principles underlying" then-recent legislation extending Title VII to public employees, but those principles are a matter of policy as well as constitutional law. And other comments suggest that Congress and the President simply thought that providing age discrimination coverage to State employees was good social policy, and that "age-ism" should be eradicated the same as racism or other "isms." H.R. Rept. No. 93-913, 93<sup>rd</sup> Cong., 2d Sess., reprinted at *U.S. Code Cong. & Admin. News* (1974), 2811, 2849 ("Discrimination based on age—what some people call 'age-ism'—can be as great an evil in our society as discrimination based on race or religion or any other characteristic which ignores a person's unique status . . . it destroys the spirit of those who want to work and it denies the National [*sic*] the contribution they could make if they were working."). Further, any comparisons to other forms of discrimination were undercut by Congress' finding (regarding private sector, not State, practices) that age discrimination did not present nearly as stark a situation as race and sex discrimination did. See Senate Special Comm. on Aging, 93d Cong., 1st Sess., *Improving the Age Discrimination Law III* (Comm. Print 1973) (*Improving the Law*) ("There are no situations like the race cases . . . [n]or is there anything analogous to the equal pay sex discrimination cases").<sup>5</sup>

<sup>5</sup> One type of "equal treatment" concern raised by Congress was equality between private-sector and public-sector employees, but that classification not only receives minimal protection, but it does not even raise concerns of "invidious discrimination." Indeed, were this distinction a legitimate source of Section 5 power, *Seminole Tribe's* rejection of Commerce Clause-based abrogation would be eviscerated. *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). Congress could simply regulate private behavior (regarding employment or otherwise) under its Commerce power, and

3. Consequently, Congress' power to remedy constitutional violations was not triggered at all by any Congressional findings, and nothing proffered by either Petitioner changes that result. The United States' heading on this point is telling: "Congress Determined, On An Ample Record, That Unconstitutional Discrimination Against Older Workers Is Sufficiently Widespread To Warrant Preventive And Remedial Legislation." U.S. Br. at 29. True to the heading, the United States recites extensive legislative history evidencing findings of "widespread" discrimination—by the private sector, and by the federal government, but *not by the States*. *Id.* at 29-39. The only State-specific "evidence" noted by either the United States or Kimel appears to be Senator Bentsen's comments, with his references to constituent letters.

The evidence of widespread societal or private-sector discrimination can not suffice, as that view flies in the face of not only logic but of *Florida Prepaid*. After all, the private sector is rife with patent infringement, and thousands of cases are filed each year. If Congress could surmise that States, as large employers, must reflect corporate practice in employment, then why not presume that States, as large enterprises, must surely infringe patents at the rate of more than eight a century? Cf. *Florida Prepaid*, 119 S. Ct. at 2210-2211.

Moreover, there are reasons to infer that States are *less* likely to discriminate than private-sector employers. First, the States have been leaders in establishing antidiscrimination laws in their role as regulators of the private sphere, and hypocrisy should not be the presumed

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then invoke Section 5 to "equalize" across the public-private divide.



position without evidence. See Appendix A and B. Second, unlike private employers, State employment is largely covered by civil service rules, which are designed to drain employment decisions of everything but merit, and often require "cause" for dismissal, thus automatically removing age as well as other improper classifications from the equation.

Nor can Petitioners point to legislative records *after* 1974 to establish a factual predicate of unconstitutional discrimination. Normally, "[i]t is the intent of the Congress that enacted [the section] . . . that controls." *Oscar Mayer and Co. v. Evans*, 441 U.S. 750, 758 (1979), quoting *Teamsters v. United States*, 431 U.S. 324, 354 n. 39 (1977). Here, where the issue is not purely legislative intent, but the factual predicate available to Congress, data collected by *previous* Congresses might be considered. But post-1974 Congresses cannot retroactively justify purported Section 5 legislation, as "[l]egislative observations 10 years after the passage of the Act are in no sense part of the legislative history." *United Air Lines, Inc. v. McCann*, 434 U.S. 191, 200 n. 7 (rejecting use of 1977 ADEA amendment history when construing sections passed previously).

Moreover, the 1977 record, even if considered, merely confirms that Congress did not uncover *constitutional* violations, but as in *City of Boerne*, addressed solely the type of constitutional behavior that the legislation would prohibit. In passing the 1977 amendments, Congress sought to statutorily *reverse* the result in *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976); *Vance v. Bradley*, 440 U.S. 93 (1979), and other cases that upheld the constitutionality of mandatory retirement ages, by forbidding under ADEA that which was permitted under the 14th Amendment. House Select Committee on Aging, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess., *Mandatory Retirement: The Social and Human*

*Cost of Enforced Idleness* 38 (Comm. Print 1977) ("If mandatory retirement because of age—the final step in the practice of age discrimination—is not be declared unconstitutional by the Courts, then Congress should act to make such a practice illegal".)

Despite this meager evidence, the United States urges that the record should suffice because the Court should defer to Congress' superior factfinding ability. U.S. Br. at 39. But this presupposes that *some* facts be found, so that the Court may defer to Congress' assessment of those facts. If the facts of a few patent suits could not suffice to trigger such extreme deference, then neither can the "evidence" of some purported constituent letters with nothing more.

Nor is such extreme deference mandated by the voting rights cases. In *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), and *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the Court upheld Congress' suspension of literacy tests under Section 5 because such tests historically had been used to disenfranchise blacks. *See also City of Rome v. United States*, 446 U.S. 156 (1980) (refusing "to disturb Congress' considered judgment that banning electoral changes that have a discriminatory impact is an effective method of preventing States from [undoing] or [defeating] the rights recently won by Negroes"). In sharp contrast, the Court has already noted that age discrimination does *not* carry the same type of history that is unfortunately well-founded regarding racial discrimination. *Murgia*, 427 U.S. at 313.

For all of these reasons, Congress had no evidence before it of constitutionally-impermissible age discrimination by any States when it extended the ADEA's coverage to all of the States. For this reason alone, the ADEA extension is

not legitimate Section 5 legislation, and the States' immunity should prevail.

**B. The ADEA's Restrictions Are Far Out Of Proportion To Constitutional Guarantees Against Irrational Age Discrimination.**

1. The ADEA's strict limits on the use of age in employment decisions go far beyond what is required by the Fourteenth Amendment, and swept under the ADEA's prohibitions are wide ranges of constitutionally valid conduct. Thus, even if Congress had adequate cause to enact *any* remedy against the States regarding age discrimination, the ADEA is "so out of proportion to a supposed remedial or preventive object that [it] cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Florida Prepaid*, 119 S.Ct. at 2207, citing *City of Boerne*, 521 U.S. at 532.

If the ADEA were designed to *enforce* existing constitutional protections, it would codify the "rational basis" standard of review, as legislative classification based on age is neither suspect nor quasi-suspect and therefore is subject only to "rational basis" scrutiny under the Equal Protection Clause. *Murgia*, 427 U.S. at 314; *Vance*, 440 U.S. at 97. But the ADEA goes further, and ratchets up the scrutiny applied to employment decisions in which age is a factor to a level essentially indistinguishable from the scrutiny applicable to decisions based on ethnicity or gender. By subjecting age-based classifications to a strict scrutiny standard, the ADEA attempts to substantively change the constitutional rights of those individuals protected by the ADEA by creating a new "suspect classification." That this sort of restructuring of constitutional rights is beyond Congress' power has been recognized by the Court since *Marbury v. Madison*, 5 U.S. 137 (1803).

As the Court stated in *City of Boerne*:

If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be "superior paramount law, unchangeable by ordinary means." It would be "on a level with ordinary legislative acts, and like other acts, . . . alterable when the legislature shall please to alter it." Under this approach it is difficult to conceive of a principle that would limit congressional power.

*City of Boerne*, 521 U.S. at 529, quoting *Marbury v. Madison*, 5 U.S. 137, 177 (internal citations omitted).

Even if the legislative history supported the notion that the ADEA's extension to the States was a response to discriminatory age limits set in the past, it was precisely such age limits that were held *not* to violate the Equal Protection Clause in *Murgia* and *Vance v. Bradley*. Thus, the ADEA cannot be regarded as an effort to "remedy" prior state violations of the Equal Protection Clause's rational basis test; rather, it "remedied" behavior well within constitutional bounds. *Cf. City of Boerne*, 521 U.S. at 535.

Nor can the ADEA be defended as merely codifying the rational basis standard, *see* U.S. Br. at 46, as the narrow defense allowed for "bona fide occupational qualifications" ("BFOQs") that are "reasonably necessary" is a far cry from rational basis. As this Court explained, presenting a successful BFOQ defense requires much more than offering a "rational basis" for an action. *See Western Airlines v. Criswell*, 472 U.S. 400, 421 (1985) (rational basis standard is "significantly different from that conveyed by the statutory

phrase 'reasonably necessary'); *id.* at 422 ("rational basis standard is also inconsistent with" ADEA standard and BFOQ requirements).

Under normal rational basis review, a plaintiff must establish the invalidity of the challenged practice or law, and a reviewing court may hypothesize any rational justification for the government practice, whether it actually motivated the government actors or not. But to establish a BFOQ defense, an employer has the burden of proof, and it must prove that

An employer asserting a BFOQ defense has the burden of proving that (1) the age limit is reasonably *necessary* to the essence of the business, and either (2) that all or substantially all individuals excluded from the job involved are in fact disqualified, or (3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age. If the employer's objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged practice does indeed effectuate that goal and that *there is no acceptable alternative* which would better advance it or equally advance it with less discriminatory impact.

*Criswell*, 472 U.S. at 417 n.24 (emphasis supplied). This stringent standard is the stuff of strict scrutiny—"no acceptable alternative"—not of rational basis.

The chasm between constitutional standards and the ADEA is further demonstrated by the Court's decision that the federal government is free to impose stricter standards upon State and local governments as employers, forbidding the use of most mandatory age limits, even while the federal government continues to use such limits for federal

employees. See *Johnson v. Mayor of Baltimore*, 472 U.S. 353, 370-71 (federal civil service age limit is not proof of BFOQ for similar State employees). Assuming, of course, that such federal practice clears constitutional scrutiny, the States are plainly foreclosed from a wide range of practices that are open to the United States, and that would be *constitutionally* open to the States. This result — that the federal government remains able to choose policies that it forbade for the States under the ADEA — is particularly ironic in light of Congress's reliance on *federal* government age discrimination when it extended the ADEA to the States.

Moreover, Congress apparently understood that the ADEA standard it established was stronger than constitutional standards. After *Murgia* upheld the constitutionality of a mandatory retirement age in 1976, Congress amended the ADEA to expressly forbid most such age limits. Such now-forbidden limits would almost certainly survive constitutional scrutiny. See *Wyoming*, 460 U.S. at 260-61 (Burger, C.J., dissenting) ("Were we asked to review the constitutionality of the Wyoming State Highway Patrol and Game and Fish Warden Retirement Act, we would reach a result consistent with *Bradley* and *Murgia*.")

2. The stricter limits of the ADEA intrude deeply into the operation of State government. Contrary to the United States' description of employment as "only" one narrow area of State activity, U.S. Br. at 49, the States' employment decisions necessarily involve *every* area of State government, as the State cannot act except through its agents. The ADEA dictates a core part of State action *within* every known field—education, health, corrections, law enforcement, etc.

The intrusion is greatly broadened and deepened by the reality of disparate impact suits. While the United States



correctly notes that the availability of such suits under the ADEA is still unsettled by this Court, U.S. Br. at 46 n.45, *Hazen Paper Co. v. Higgins*, 507 U.S. 604, 610 (1993), the reality is that the States face such suits constantly and must defend against them. See *Coger*, 154 F.3d 296 (6th Cir. 1998), cert. petition pending, No. 98-821. Indeed, this very suit involves disparate impact claims, see Petitioner Kimel's Brief ("Kimel Br.") at 8-9 n. 9, and similar suits have burdened many States. See, e.g., *Coger v. Board of Regents of the State of Tennessee*, 154 F.3d 296, 299 (6th Cir. 1998) (disparate impact claims), cert. petition pending, No. 98-821; *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 693 (3rd Cir. 1995) (State Job Services office sued for administering General Aptitude Test Battery for use in referring applicants to employers). And because the hallmark of immunity is relief from the burdens and indignity of suit, not merely from imposition of liability, it does the States little good to note the future possibility that such suits will be judicially abolished, after a quarter-century of States' facing them to varying degrees.

Moreover, the flexibility of disparate impact theory means that such suits can affect much more than typical hiring and firing decisions. For example, in *Blanciak*, the Pennsylvania Jobs Office was sued along with private employers under the ADEA, and the plaintiffs alleged that the Jobs Office discriminated by administering the General Aptitude Test Battery in order to match employees and employers. *Blanciak*, 77 F.3d at 693. While such testing would easily survive Equal Protection review, see *Washington v. Davis*, 426 U.S. 229 (1976), it apparently may open the State to ADEA litigation, thus deterring the use of such tests and causing the State employment agency to use some other, perhaps less appropriate, tool to serve its citizens in job placement.

Even more broadly, disparate impact suits cast a shadow not only on State employment practices, but threaten States' ability to decide basic issues of budgeting, and even to determine the fundamental structure and execution of government functions. Indeed, the facts of this case illustrate the breadth and depth of the impact of ADEA suits on government decisions. The Florida Board of Regents was sued for what is essentially a policy decision—to allocate certain funds to state universities *while allowing each school the flexibility to spend its funds as it saw fit*. Kimel Br. at 8 n. 8. Because two universities chose *not* to spend the money on scheduled salary enhancements for long-term faculty members—typically older faculty—the Board of Regents must defend its decision not to mandate how the money must be spent. Consequently, virtually any budget decision—such as spending money on textbooks, libraries, or student aid, rather than faculty pay—could be similarly challenged as having a disparate impact, or could even be alleged as a cover for disparate treatment. Policy choices to eliminate or shrink departments, or to privatize government functions, could likewise be challenged.

The United States turns *Boerne* on its head by suggesting that the intrusion into State activity is minimized or even eliminated because the States, by enacting their own antidiscrimination laws, have "disclaimed any interest in using age" in most employment decisions. U.S. Br. at 51-52. This view puts States in an impossible bind: if States do not act to halt conduct that Congress dislikes, it is more likely that Congress will find predicate violations to exercise its remedial power. But if they do act, that self-correction can justify Congressional abrogation because the interference has a "minimal impact" on State activity. U.S. Br. at 47-48. But surely the States also foreswear intentional patent infringement as a matter of policy, and the States have enshrined protection of the free exercise of religion in their

state constitutions. But these policy choices did not grant Congress power to enact the Patent Remedy Act or RFRA intrude on the theory that it would not change much that the States seek to do.

Perhaps the greatest evidence that States see the ADEA as intrusive is the very fact that States have fought this and similar suits so vigorously. If the money-damages suits had little impact on State activity, and if States cared little if they were sued in State or federal courts, or under State or federal law, then States would not find it worth the effort to fight for this principle. Yet the courts have been full of such resistance by the States, and this very case represents only one of several that have been fought all the way to this Court. By their statements in all of these cases, the States have indicated a collective majority view that ADEA suits intrude upon our immunity.

\* \* \*

Though the *amici* States stand firm in favor of immunity from money-damages suits in federal courts, it must not be forgotten that State and local government employees are still protected from age discrimination. First, and most important, those substantive protections are available in similar or better measure by the States' own laws. See Appendix B. And the ADEA itself still applies, as this Court has already held that the ADEA is a valid enactment as applied to the States pursuant to the Commerce Clause, *EEOC v. Wyoming*, 460 U.S. 226 (1983), and the Eleventh Amendment does not protect the States from suit by the federal government, *United States v. Mississippi*, 380 U.S. 128, 140-41 (1965), as exemplified in part here. Thus, although *Florida Prepaid* and *City of Boerne* require dismissal of the claims in this case, State officials are not

excused from compliance with the ADEA, and State employees are protected from age discrimination.

## CONCLUSION

For all of the above reasons, the *amici* States urge the Court to affirm the judgments below.

Respectfully submitted,

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Date: August 17, 1999

## APPENDIX A

### STATE LAWS PROTECTING PUBLIC EMPLOYEES FROM AGE DISCRIMINATION IN 1974

California	Cal. Gov't Code § 12900 et seq.
Connecticut	Conn. Gen. Stat. § 46a-51 et seq.
Delaware	Del. Code Ann. Tit. 19 § 710 et seq.
Florida	Fla. Stat. Ann. § 112.043 et seq.
Illinois	Ill. Rev. Stat. 1973, ch. 48, § 881 et seq.
Indiana	Ind. Code Ann. § 22-9-2-1 et seq.
Iowa	Iowa Code Ann. § 216.1 et seq.
Louisiana	LAS-Const. Art. I, § 3.
Maine	Me. Rev. Stat. Ann. tit. 5, § 4551 et seq.
Maryland	Md. Cod. Ann. Art. 49B § 1 et seq.
Massachusetts	Mass. Gen. Laws ch. 151B § 1 et seq.
Michigan	Mich. Comp. Laws § 423.301 et seq. (Repealed in 1977 § 432.303a et seq.)
Nevada	Nev. Rev. Stat. § 281.370
New Hampshire	N.H. Rev. Stat. Ann. § 354-A:1 et seq.
New Jersey	N.J. Stat. § 52:14-11 (hiring practices only)



## APPENDIX A

STATE LAWS PROTECTING PUBLIC  
EMPLOYEES FROM AGE  
DISCRIMINATION IN 1974

New Mexico	N.M. Stat. Ann. § 28-1-1 et seq.
New York	NY Exec Law § 290 et seq.
North Dakota	N.D. Cent. Code § 34-01-17
Oregon	OR. Rev. Stat. § 659.010 et seq.
Pennsylvania	Pa. Stat. Ann. Tit. 43 § 951 et seq. (Purdon)
Rhode Island	R.I. Gen. Laws 28-6-1 et seq., (Repealed in 1980 by § 28-6-1 et seq.)
South Dakota	S.D. Codified Laws § 3-6A-15
South Carolina	S.C. Code Ann. § 1-13-10 et seq.
Vermont	Vt. Stat. Ann. tit. 3 § 1001 et. seq. (hiring practices only)
Washington	Wash. Rev. Code § 49.60.010 et seq.
West Virginia	W. Va. Code § 5-11-1 et seq.

## APPENDIX B

STATE LAWS PROTECTING PUBLIC  
EMPLOYEES FROM AGE DISCRIMINATION

Alabama	Ala. Admin. Code r.670-X-4-.01
Alaska	AK Stat §18.80.200 et seq.
Arizona	Ariz. Stat. § 41-1461 et seq.
Arkansas	AR. Stat. § 21-3-201 et seq.
California	Cal. Gov't Code § 12900 et seq.
Colorado	Col. Stat. § 24-34-401 et seq.
Connecticut	Conn. Gen. Stat. § 46a-51 et seq.
Delaware	Del. Code Ann. Tit. 19 § 710 et seq.
Florida	Fla. Stat. Ann. § 760.01 et seq.
Georgia	G.A. Stat. § 45-19-20 et seq.
Hawaii	H.I. Stat. § 378-1 et seq.
Idaho	Idaho Code Ann. § 67-5901 et seq.
Illinois	Ill. Rev. Stat. 775 5/2-101 et seq.
Indiana	Ind. Code Ann. § 22-9-2-1 et seq.
Iowa	Iowa Code Ann. § 216.1 et seq.
Kansas	KS ST § 44-1111 et seq.
Kentucky	KY ST § 344.010 et seq.

Louisiana	LA RS § 23:301 et seq. LSA-Const. Art. I, § 3
Maine	Me. Rev. Stat. Ann. tit. 5 § 4551 et seq.
Maryland	Md. Cod. Ann. Art. 49B § 1 et seq.
Massachusetts	Mass. Gen. Laws ch. 151B § 1 et seq.
Michigan	Mich. Comp. Laws § 37.2101 et seq.
Minnesota	MN Stat. § 363.01 et seq.
Mississippi	MS Stat. §§ 25-9-103, 25-9-149
Missouri	MO § 213.010 et seq.
Montana	Mont. Code Ann. § 49-3-101 et seq.
Nebraska	Neb. Rev. Stat. 48-1001 et seq.
Nevada	Nev. Rev. Stat. § 281.370
New Hampshire	N.H. Rev. Stat. Ann. § 354-A:1 et seq.
New Jersey	N.J. Stat. Ann. § 10:3-1 et seq.
New Mexico	N.M. Stat. Ann. § 28-1-1 et seq.
New York	NY Exec Law § 290 et seq.
North Carolina	Gen. Stat. of N.C. 126-16 and 126-36
North Dakota	N.D. Cent. Code § 14-02.4-01 et seq.
Ohio	Ohio Rev. Code. § 4112.01 et seq.

Oklahoma	Okla. Stat. Ann. tit. 25, §§ 1201, 1302 et seq.
Oregon	Or. Rev. Stat § 659.010 et seq.
Pennsylvania	Pa. Stat. Ann. tit. 43 § 951 et seq.
Rhode Island	R.I. Gen. Laws Ann. § 28-5-1 et seq.
South Carolina	S.C. Code Ann. § 1-13-10 et seq.
South Dakota	S.D. Codified Laws § 3-6A-15
Tennessee	Tenn. Code Ann. 4-21-101 et seq.
Texas	Tex. Labor Code Ann. § 21.001 et seq.
Utah	Utah Code Ann. 34A-5-101 et seq.
Vermont	Vt. Stat. Ann. tit. 21 § 495 et seq.
Virginia	Va. Code Ann. § 2.1-116.10 et seq.
Washington	Wash. Rev. Code § 49.60.010 et seq.
West Virginia	W Va. Code § 5-11-1 et seq.
Wisconsin	Wis. Stat. Ann. § 111.19 et seq.
Wyoming	Wy. Stat. Ann. § 27-9-101 et seq.

Supreme Court, U.S.  
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No. 98-791

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IN THE  
*Supreme Court of the United States*

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J. DANIEL KIMEL, JR., *et al.*,  
*Petitioners,*

v.

FLORIDA BOARD OF REGENTS, *et al.*,  
*Respondents.*

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On Writ of Certiorari to the  
United States Court of Appeals  
for the Eleventh Circuit

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**BRIEF AMICUS CURIAE OF THE  
COALITION FOR LOCAL SOVEREIGNTY  
IN SUPPORT OF THE RESPONDENT**

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In The  
Supreme Court of the United States  
October Term, 1999

No. 98-0791

Daniel Kimel,  
Petitioner,

v.

Florida Board of Regents,  
Respondent,

On appeal from the  
United States Court of Appeals  
for the Eleventh Circuit

Brief Amicus Curiae of the  
Coalition for Local Sovereignty  
in support of the Respondent

The Coalition for Local Sovereignty respectfully submits this brief as amicus curiae<sup>1</sup>. Letters of consent from both parties have been filed with the Clerk of the Court. The brief urges the reversal of the appeals court ruling and dismissal of suit against Florida, by reason of immunity.

Interest of the Amicus Curiae

CLS is a non-profit educational foundation, whose membership includes state and local officials from across the country. We

<sup>1</sup> Counsel for the amicus and its director, Dr. Paul Clark, authored this brief. No other person other than the amicus or its counsel made a monetary contribution to the preparation or submission of the brief.

have no financial, or other direct interest in the case, other than desire to support self-government and the rule of law. CLS has, for several years, been in the forefront of advocating a restoration of the doctrine of legal immunity for state and local government in federal court.

### STATEMENT OF THE CASE

The petitioner has brought suit against an agency of the State of Florida alleging age discrimination. Florida invoked its immunity under the Eleventh Amendment, but the Appeals court refused to acknowledge that immunity.

### SUMMARY OF ARGUMENT

The US Supreme Court in recent cases has acknowledged the doctrine of sovereign immunity of States from prosecution in federal court. These decisions have led to a host of cases in which States have sought to invoke their immunity against a wide range of suits. A main question now before the Court is whether or not the Fourteenth Amendment somehow negates the Eleventh Amendment's guarantee of immunity of States from suit by individuals in federal court.

It is a fundamental rule of legal interpretation that one part of the Constitution cannot be taken to negate another part if both sections can be interpreted so that both have full force. It is entirely possible to take both the Eleventh Amendment and the Fourteenth Amendment at face value so that both will have effect. The prohibition on certain actions of States contained in Amendment 14 do not differ qualitatively from other prohibitions on States found in Article 1 section 10. If both Art 1 section 10 and Amendment 11 are not contradictory (which no one has ever suggested) then there is no reason to regard Eleven and Fourteen as in conflict. Hence both must be given full force. States may not be sued in federal court even for "civil rights" violations.

### ARGUMENT

The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to *ANY* suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The Eleventh Amendment thus provides no exceptions to the immunity of States in federal court. Attempts to carve out exceptions are entirely beyond the text and history of the amendment, and of the Constitution as a whole.

At the time of ratification many anti-Federalists were concerned that the clause in the Constitution stating that federal courts would have jurisdiction in "suits between a State ... and foreign states, citizens or subjects" would allow suits against States by individuals in Federal court.

Hamilton and the Federalists argued that this jurisdiction was only one way, States could sue individuals in federal court, but individuals could not sue States. This is explained by Hamilton in Federalist 81:

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. . . . there is no color to pretend that the State governments would, by the adoption of this [constitution], be divested of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. . . . To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting State; and to ascribe to the federal courts, by mere implication, and in destruction of preexting right of



the State governments, a power which would involve such a consequence, would be altogether forced and unwarranted.

James Madison, made it equally clear that an individual could never sue a state in federal court. Madison declared at the Virginia ratifying convention, "controversies between a state and citizens of another state is much objected to, and perhaps without reason. *It is not in the power of individuals to call any state into court.* The only operation it can have is that, if a state should wish to bring a suit against a citizen" (3 Elliott, Debates, 533, also quoted in *Hans v. Louisiana*, emphasis added).

Despite Hamilton's and Madison's assurances, there was an opening for judicial attack upon state sovereignty. Almost immediately a case arose (*Chisholm v. Georgia* (1793)) in which a citizen of another State brought suit against Georgia and the suit was heard in federal court.

The majority opinion of the court adopted the anti-federalist reading, however, and said that the text of the Constitution made no such distinction as Hamilton had stated.

The minority opinion written by Justice Iredell, however, closely followed the analysis of Hamilton arguing that "A State is altogether exempt from the jurisdiction of the Courts of the United States, or from any other exterior authority, unless in the special instances where the general Government has power derived from the Constitution itself." A State retains all of its sovereignty unless there is "specific and explicit cession" of that sovereignty in the Constitution--and suits by individuals against States was not explicitly ceded by the States.

It should be noted that suits by individuals against their own States was never even imagined to be allowable. In summarizing the constitutional issue under discussion in the dispute Iredell noted:

The Constitution, therefore, provides for the jurisdiction

wherein a State is a party, in the following instances:--1st. Controversies between two or more States. 2nd. Controversies between a State and citizens of another State. 3d. Controversies between a State, and foreign States, citizens, or subjects. And it also provides, that in all cases in which a State shall be a party, the Supreme Court shall have original jurisdiction.<sup>2</sup>

This was obviously meant to be an inclusive list, and the question under dispute was whether or not the second category gave jurisdiction in all such suits or only to States suing individuals.

After the decision of the Court in *Chisholm* (which upheld the expansive anti-federalist reading of the Constitution) it was recognized that to preserve sovereignty it was necessary that all suits against a State be heard in the State court. As a result Congress quickly passed and the states ratified the Eleventh Amendment specifying that the nothing in the constitution could be construed to allow federal jurisdiction in suits against a State by citizens of any other state or country.

This closed the apparent loophole in the Constitution which made State action subject to federal jurisdiction through the suit of a non-citizen.<sup>3</sup> It should be obvious that the language of this amendment is extremely clear and not open to much interpretation: if a non-state-citizen files suit against a State such

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<sup>2</sup> The Court has also violated the protection afforded states that "in all cases in which a state shall be a party the Supreme Court shall have original jurisdiction." States are totally immune from suits in lower courts, but that is too broad to be addressed here.

<sup>3</sup> Although a state could be a defendant in federal court if one state filed suit against another, this is fairly rare, and since only another state and not an individual could initiate such action, the danger of federal intrusion is more remote.

a case is not subject to federal jurisdiction--at all.

The clarity of the amendment's language was immediately approved by the authority of the Court in equally plain language. In *Hollandsworth v. Virginia*, the plaintiff had argued that his suit against Virginia should go forward because it had been commenced prior to the adoption of the amendment. The Court's unanimous ruling leaves no doubt as to the absolute nature of the amendment, as it declared that "the amendment being constitutionally adopted, there could not be exercised *any jurisdiction*, in *any* case, past or future, in which a state was sued by citizens of another state." This makes as clear as can be that the Court did not believe there were any exceptions to the clear language of the amendment.

As to suits by its own citizens, the Court noted in *Coeur d'Alene v. Idaho*: "the dignity and respect afforded a State, which the immunity is designed to protect, are placed in jeopardy whether or not the suit is based on diversity jurisdiction. As a consequence, suits invoking the federal question jurisdiction of Article III courts may also be barred by the Amendment." This question has now been definitively settled by *Alden v. Maine*, and *College Savings Bank v. Florida* (1999).

Over the last 80 years the court had attempted to create various exceptions to state immunity. At least one, the doctrine of implicit consent created in *Parden v. Terminal Railroad*, has now been officially scrapped. Others remain to be scrapped.

First is the fiction set out in *Ex Parte Young*, that an individual may sue individual State officers while the Court pretends that this is not a case against the State. The governor of Georgia was also named as a defendant in *Chisholm*. If the Eleventh Amendment is no bar to suits against government officials as individuals, *Chisholm v. Georgia* could still have proceeded under the Young fiction even had the Eleventh Amendment been in place. No honest person can seriously imagine that the framers of the Eleventh Amendment would have allowed such a thing. Since the Eleventh Amendment was

designed explicitly to overrule and to enshrine in Constitutional law for all time the dissenting opinion Justice Iredell, any interpretation of the Constitution which would allow *Chisholm v. Georgia* to be heard in federal court must run afoul of the Eleventh Amendment. The Young fiction is, of course, internally contradictory and ought to be repudiated once and for all.

As Justice Harlan noted in his dissenting opinion:

The suit was, as to the defendant Young, one against him as, and only because he was, Attorney General of Minnesota. No relief was sought against him individually but only in his capacity as Attorney General. And the manifest--indeed, the avowed and admitted--object of seeking such relief was to tie the hands of the [State]. It would therefore seem clear that within the true meaning of the Eleventh Amendment suit brought in the federal court was one, in legal effect, against the State (also cited with approval by the plurality in *Coeur d'Alene v. Idaho*).

The Court has already taken a step in this direction in *Alden* declaring that "Some suits against State officers are barred by the rule that sovereign immunity is not limited to suits which name a State officer as a party if the suits are, in fact, against the State."

Another exception suggested by some is that the Eleventh Amendment "does not bar certain actions against State officers for injunctive or declaratory relief." This is clearly contradictory of the Eleventh Amendment which bars all suits in law or equity. Injunctive relief is exactly the sort of thing covered by the courts of equity, and as such is expressly prohibited by the amendment.

The most important exception is that created by *Fitzpatrick v. Bitzer* in 1976 which said that Congress may nullify state immunity when it claims to be using its power of enforcing the Fourteenth Amendment. This is the primary objection and main issue in the current case. The court ought to



take this opportunity to overrule Fitzpatrick, just as it overruled Parden last term.

A majority in Fitzpatrick ruled that "We think that Congress may, in determining what is 'appropriate legislation' for the purposes of enforcing the provisions of the Fourteenth Amendment, provide for private suits against a State or State officials which are constitutionally impermissible in other contexts."

As David Currie has written in a critique of Fitzpatrick, this reasoning could just as well be applied to any part of the Constitution. Currie notes: "This reasoning is less than overwhelming. One might have thought that subsec. 5 [of the Fourteenth Amendment], like other 'plenary grants of power, was subject to explicit and implicit constitutional limitations; one would hardly read it to empower Congress to authorize cruel and unusual punishment [for violators of the Fourteenth Amendment]."<sup>4</sup> In other words, if Congress now has power to overrule parts of the Constitution in order to protect constitutional rights which they claim to be protected by the Fourteenth Amendment, then they are able to proscribe cruel and unusual punishment or anything else they deem "appropriate" for such protection, even though explicitly prohibited by other parts of the Constitution.

The argument that the Fourteenth Amendment actually overrules the Eleventh, can only be based upon the claim that the two amendments are inherently contradictory.

It is a fundamental rule of interpretation that *we must give full effect to all parts of the Constitution unless one clause is clearly incompatible with and contradictory to another*. The Twenty-first amendment for example says that "The eighteenth article of amendment to the Constitution of the United States is

hereby repealed." The Fourteenth Amendment contains no such provision. The Eleventh Amendment is quite explicit that "the Judicial power of the United States shall not be construed to extend to" private suits against States. That statement is not contradictory of anything in the Fourteenth Amendment.

The fact that courts tried to give full force to both amendments for over 100 years is strong evidence that Fitzpatrick was wrongly decided.

There is nothing incompatible with the Fourteenth Amendment prohibiting States from denying equal protection, and the Eleventh Amendment saying that if they do, it is not the role of the federal courts to make them.

As the plurality ruled in *Ceour d'Alene v. Idaho* "It would be error coupled with irony were we to bypass the Eleventh Amendment, which enacts a scheme solicitous of the States, on the sole rationale that state courts are inadequate to enforce and interpret federal rights in every case."

This point seems eminently clear from an analysis of the relation of Article 1 section 10 and the Eleventh Amendment. Article 1 section 10, of course, provides a list of things which States are prohibited from doing: passing a "bill of attainder, ex post facto law, or law abridging freedom of contract" and so forth. In 1798 the Eleventh Amendment is ratified, and sovereign immunity is unquestionably enshrined in the Constitution (at least with reference to non-citizens). Does the Eleventh Amendment overrule and supersede art 1 sec 10? Can a State now pass a bill of attainder confiscating the property of a citizen of another State?

No one has ever argued that the Eleventh Amendment overruled Art 1 sec 10. Even the most diehard apologist for State's rights would not make such an argument. The assertion is preposterous. Even the most alarmist of anti-federalists never imagined that Article 1 sec 10 could be used to nullify sovereign immunity: as Alden declared, "The [Eleventh] Amendment's language, furthermore, was directed toward Article III, the only

<sup>4</sup> David Currie, *The Constitution in the Supreme Court* (Chicago: University of Chicago Press, 1990), 573.



constitutional provision believed to call state sovereign immunity into question."

If a State in 1800 had attempted to make a law prohibited by Article 1, section 10, then it would have been unconstitutional, but any foreign citizen affected still would not have been able to bring suit against the State in federal court. He would need to bring suit in state court and demand that state judges rule the edict as a violation of the constitution. It is entirely reasonable (and indeed our federal system was long built on the assumption) that some rights granted by the federal constitution are binding on a State, but that it is the sole responsibility of state and local government to guarantee it.

This was precisely the ruling of the Court in *Hans*:

That a state cannot be sued by a citizen of another state, or of a foreign state, on the mere ground that the case is one arising under the constitution or laws of the United States, is clearly established by the decisions of this court in several recent cases. Those were cases arising under the constitution of the United States, upon laws complained of as impairing the obligation of contracts. . . . It was not denied that they presented cases arising under the constitution; but, notwithstanding that, they were held to be prohibited by the [eleventh] amendment (*Hans v. Louisiana*).

In *Couder d'Alene* the plurality opinion declared that "Neither in theory or in practice has it been shown problematic to have federal claims resolved in State courts where 11th Amendment immunity would be applicable . . . Federal courts, after all, did not have general federal question jurisdiction until 1875."

If there is no necessary contradiction between Art 1 sec 10 and the Eleventh Amendment, as everyone will acknowledge, then there is also no reason to assume that there is a

contradiction between the Eleventh and the Fourteenth Amendments. The wording in I, 10 and in Amendment 14 is, after, all identical: "no State shall" do x, y, z. If there is no explicit contradiction then both parts must be given full force.

Chisholm noted that "A state retains all of its sovereignty unless there is specific and explicit cession of that sovereignty." Certainly there is no "specific and explicit cession" of sovereign immunity found in the Fourteenth Amendment. Any attempt to find one is by implication or drawing on various "penumbras and emanations," but it is certainly not explicit.

We may also cite Alden (citing Blatchford) which postulated that "Congress may subject the States to private suits in their own courts only if there is 'compelling evidence' that the States were required to surrender this power to Congress pursuant to the constitutional design." By this standard there is no "compelling evidence" to suggest that the Fourteenth Amendment was meant to overrule sovereign immunity. Rather, precedents established by the Court in the 1880's and 1890's suggest that the Court regarded sovereign immunity as still fully in effect (*Clark v. Barnard* (1883) *Hans v. Louisiana* (1890), and *Smith v. Reeves* (1900)).

Moreover, even if one accepts that the Fourteenth Amendment was designed to effect a "fundamental shift" in State/federal relations, the exact nature of that shift is still open to much debate. The assertion that denial of sovereign immunity was part of that shift is again based on nothing more than assumption and implication, and is contrary to all of the jurisprudence of the late 19th Century. To utterly nullify an entire article of the Constitution based on mere implication should not happen.

The Eleventh Amendment is "specific and explicit" about what the federal courts may not do. To overrule a specific and explicit prohibition by appeal to a mere guess and implication is contrary to every rule of legal interpretation. It is as if Congress were to enact a provision violating the explicit provisions of one

part of the constitution, while appealing to its "implied powers" as authority to do so. It would be the height of absurdity to imagine that Congress could set aside specific and explicit prohibitions based on an appeal to any "implied powers;" yet this is precisely what people do who argue that Congress may ignore the explicit prohibition in Amendment 11, based on an "implied power" found in Amendment 14.

To this effect we cite no less an authority on the subject than Alexander Hamilton, who in discussing sovereign immunity in Federalist 81, declared that "to ascribe to the federal courts, by mere implication, and in destruction of preexting right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarranted."

Whether or not age discrimination is a valid enforcement of the Fourteenth Amendment we do not address. We do not believe it is, but even if it were it would still not matter. The issue must be left to state tribunals and state citizens to decide.

### Conclusion

In summary we cite the judgement of the Court in Alden which proclaimed

"The principle of immunity from litigation assures the States and the nation from unanticipated intervention in the processes of government." (Great Northern Life Ins. Co v. Read) When the States' immunity from private suits is disregarded, "the course of their public policy and the administration of their public affairs" may become "subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests." (In re Ayers) While the States have relinquished their immunity from suit in some special contexts--at least as a practical matter--this surrender carries with it substantial costs to the autonomy, the

decisionmaking ability, and the sovereign capacity of the States. ... If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen.

These are spectacular words. If indeed the issue in sovereign immunity is the very preservation of representative government, how can we begin to imagine carving out exceptions for suits against state officers, for injunctive or declaratory relief, or for cases which may arise under the Fourteenth Amendment? The autonomy, decisionmaking ability and sovereign capacity of the States, is threatened more directly by these types of suits as any seeking merely monetary damages.

Respectfully submitted,

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